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Supreme Court, U.S.
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In the
Supreme Court of the United States

MICHIGAN COMMUNITY SERVICES, ET AL,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, (AFSCME), AFL-CIO, ET AL.,
Intervenors.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Sixth Circuit err where it affirmed the Board's Decision and Order extending the holding in Management Training Corp., 317 NLRB 1355 (1995), to dispose of the substantive issue of evaluating the validity of union representation elections that were affected by a misrepresentation and a subsequent material change in circumstances with regard to the identity of the employer?

2. Did the Sixth Circuit err by validating the results of union representation elections where a misrepresentation regarding the identity of the employer negatively impacted the free and fair choice of employees, where the elections were conducted under the erroneous assumption that the State was a joint employer along with the Petitioners, where the State was to participate in collective bargaining in the event of a union victory, and where the parties to the elections could not have known of the material misrepresentation prior to the elections?

3. Did the Sixth Circuit err where it extended Board comity over state-conducted union elections where there was a conflict between state and federal law that remained unresolved until after the elections?

PARTIES TO THE PROCEEDINGS

Petitioners

The Petitioners include: Michigan Community Services, Inc.; Saginaw Bay Human Services, Inc., AHS Community Services, Inc.; Alternative Services, Inc.; Bay-Arenac Community Living Facility; Independent Opportunities, Inc.; Innovative Housing Development Corp.; Jones AFC, Inc.; Lafayette RCA, Inc.; Lewisite, Inc.; Blue Water Developmental Housing, Inc.; Carson's AFC, Inc.; Cencare Foster Care Home, Inc.; Central State Community Services, Inc.; Community Normalization Home, Inc.; Community Spirit Homes, Inc.; Domel, Incorporated; Flushing Association in Transitional Housing, Inc., Successor to A.R.C. Corporation; Fredericks Family Homes A.F.C., Inc.; Harrington House, Inc.; Horizon Residential Center, Inc.; Hunt St. Villa, Inc.; New Outlook, Inc.; Louisiana Homes, Inc.; New Center II, Inc.; Passages Community Services, Inc.; Quality Living Systems Management Corp.; Paragon Non-profit Housing Corp.; Ray Roberts Residential Services, Inc.; Reach Alternative Community Homes, Inc.; and Adult Learning Systems, Inc. Petitioners are non-profit corporations, organized under the laws of the State of Michigan, that contract with the State of Michigan to provide residential care, protection, supervision, and services to Michigan residents with developmental and other disabilities. Pursuant to Rule 29.6, no Petitioners are subsidiaries or affiliates of a publicly-owned corporation. There are no known publicly-owned corporations, not parties to this Petition, that have a financial interest in the outcome.

Respondent

Respondent is the National Labor Relations Board. ("NLRB").

Intervenors

The intervening unions AFSCME and UAW (collectively "union") claim to represent employees of the Petitioners as a result of the challenged elections.

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DECISIONS BELOW

The proceedings below are officially reported as follows:

1. Mich. Community Servs., et al. v. NLRB, 309 F.3d 348 (6th Cir. 2002), Nos. 00-2192/2440/2451, dated October 30, 2002, is reproduced in the Appendix A at App. 1a.

2. Summer's Living Systems, Inc., 2000 WL 1460041 (NLRB 2000)(unpublished)., 332 NLRB No. 22. The Decision and Order is reproduced in the Appendix B at App. 28a

3. Summer's Living System's and Michigan Community Services, Inc. and Saginaw Bay Human Services, Inc. and AHS Community Services, Inc. et al., Case 7-CA-38546 et al., dated January 9, 1998. The Decision by NLRB Administrative Law Judge West is reproduced in the Appendix C at App. 90a.

4. Petitioners request that a case in another proceeding that accurately describes the financial and legal relationship between the State of Michigan and residential care providers similarly situated to the Petitioners be lodged with their Petition. That case is Residential Systems v. UAW, an unpublished decision of the NLRB Seventh Region Director, decided April 7, 1988 (Case No. 7-RC-19529). Eleven (11) copies of that case are submitted under separate cover.

JURISDICTION

The NLRB was presented with a federal question involving employees' rights to choose union representation under § 7 of the National Labor Relations Act, 29 U.S.C. §§ 151-169.

The dispute involved a group of Michigan non-profit corporations and their employees. The Administrative Law Judge issued a decision dated January 9, 1998. The Employers and the union appealed. The NLRB issued a final Decision and Order of the NLRB, dated September 25, 2000. Summer's Living Systems, Inc. et.al., 332 NLRB 22 (Sept. 25, 2000). (App. 28a). The NLRB affirmed the decision of the Administrative Law Judge to validate union elections, the results of which the Employers contested, and which are the subject of the instant appeal. After the NLRB's Decision and Order, the Petitioners timely filed their Petition for Review with the Sixth Circuit on or about October 10, 2000. The Sixth Circuit affirmed the Decision and Order of the NLRB on October 30, 2002. Michigan Community Servs., et al. v. NLRB, 309 F.3d 348 (6th Cir. 2002) (Case Number 00-2192).

In a companion case, the Respondents also appealed a portion of the Board's Decision and Order dated September 25, 2000, which invalidated union elections held after the Board's decision in Management Training Corp., 317 NLRB 1355 (1995). The Sixth Circuit denied Respondents' appeal. 309 F.3d 348 (6th Cir. 2002) (Case Number 00-2451).

Petitioners timely appeal the portion of the Sixth Circuit decision in case 00-2192, but not in case 00-2451. The Supreme Court of the United States has jurisdiction to issue a Writ of Certiorari. 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves Section 7 of the National Labor Relations Act, which states, in part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in the concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . . .

STATEMENT OF THE CASE

The Employers are non-profit corporations, licensed by the State of Michigan, that provide residential care for developmentally disabled adults in residential settings. In 1985, AFSCME and UAW (collectively, "Union") began organizing efforts at the Employers' residential care facilities. The State of Michigan funds the Employers' operations through annual contracts that set defined limits upon wages and benefits that Employers may allot.[1] Wages and benefits of employees are the Employers' single largest line-item expense. Wages for the great majority of adult residential care workers are low, in many instances just above or at minimum wage.

Proper jurisdiction, and its attendant ramifications, was litigated in Residential Systems Co., an unpublished opinion from Region Seven in 1988, NLRB Case No. 7-RC-19529 (Lodged with Petition). The Board dismissed Residential Systems, citing lack of subject matter jurisdiction, pursuant to

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[1] The State of Michigan contracts with residential home providers are not the result of arm's length negotiations between the parties. Contractual terms are dictated by the state.

the National Labor Relations Act, 29 U.S.C. §§ 151-169 (the "Act") because the State of Michigan was an integral party to proceedings involving the adult residential care industry. The Board conferred subject matter jurisdiction of the industry upon the Michigan Employment Relations Commission (MERC). Residential Systems comprehensively describes the state's extensive involvement in the adult residential care industry. The relevant text from the case states:

> The Employer contracts with MORC (the state's contracting agency at the county level) to provide services to the residents housed at its homes. Each home is governed by a separate standardized contract which the Employer asserts is presented to it on a take-it-or-leave-it basis by MORC and whose terms are not subject to negotiation. Such contracts specifically incorporate by reference existing and future policies, procedures, rules and regulations of the DMH[2] which specify in minute detail the care to be given residents.
>
> Each contract includes an annual budget for the facility with dollar amounts designated for categories of expenses as well as specific line items within said categories. Schedule A on the budget encompasses personnel expenses including salaries and fringe benefits. The dollar figure is determined thusly: MORC determines the number of staff persons required, based on the needs of the residents, and describes this

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[2] Michigan Department of Mental Health.

number in terms of Full-Time-Equivalent positions. It then multiplies this number by 40 hours and then by a set hourly rate which it has previously determined to be sufficient to cover all direct care staffing needs, including overtime, vacation, taxes and various other required employee payments. The resulting dollar amount is the total amount available to the Employer for all personnel costs at the time in question ...

Schedule A funds cannot be used for any other purpose except those designated and funds from other schedules cannot be transferred to Schedule A to make up deficiencies...

The contract between MORC and each home calls for the home to maintain a staff complement in accordance with the requirements set by MORC. It further requires that one person with familiarity and capability of implementing emergency procedures be on duty at all times that residents are at the home. ... While the Employer may request funds for enhanced staffing, such approval must be authorized by MORC in writing and is rarely granted. Each home submits quarterly reports detailing the staffing hours provided during that period; according to testimony if a home does not provide 90 percent of the required staff hours during such time, MORC is obligated to withhold funds...

> MORC sets minimum age and health standards for the hiring of new employees as well as more subjective personality requirements such as the ability to understand behavior and desire to help ... The Employer agrees by contract to make pre-employment inquiries about applicants' education background and work history and to verify references and credentials prior to hiring. Residential Systems. (Lodged with Petition).

The MERC stepped into the void left by the Board's decision in Residential Systems. The Unions filed representation petitions naming the Employers herein and the Michigan Department of Mental Health as joint employers. The State of Michigan unsuccessfully appealed the MERC's finding that the State was a joint employer. AFSCME v. Louisiana Homes, 480 N.W.2d 280, 192 Mich.App. 187 (1991); vacated, 503 N.W.2d 442, 441 Mich. 883 (1992); lv app den, 487 N.W.2d 410, reaffirmed on remand, 511 N.W.2d 696, 203 Mich.App. 213 (1994), lv den, 521 N.W.2d 607, 445 Mich. 938 (1994), cert den sub nom, Michigan Dep't. of Mental Health v. Louisiana Homes, Inc., 513 U.S. 1077, 115 S.Ct. 724, 130 L.Ed. 629 (1995), cert den, (No. 94-638). (Louisiana Homes II).

MERC conducted the union elections as authorized by the Public Employment Relations Act (PERA), Mich.Comp. Laws § 423.201 et. seq. The MERC counted the ballots in each election. The Tabulation of Election Results for each election indicates the employers as the Michigan Department of Mental Health and the individual adult residential care provider. The Union won each election.

The State of Michigan's presence was heavily broadcast throughout the election campaign. Ballots were returned to MERC offices after the employees had voted. The State of Michigan, the employer, and unions were invited to appear at MERC offices where the MERC counted the ballots.

Meanwhile, the Board changed its policy in Management Training Corp., 317 NLRB 1355 (1995). Management Training expanded the Board's jurisdiction over private employers under contract with state agencies. Management Training guided the Michigan Court of Appeals in AFSCME v. Mental Health Dep't., 545 N.W.2d 363, 215 Mich.App. 1 (1996), to vacate the MERC's decisions in all of the adult residential care cases before it on the grounds of federal preemption. The Michigan Court of Appeals held that adult residential care providers who contracted with the State were properly under the jurisdiction of the Board.[3]

The Employers maintain that the post-election departure of the State of Michigan as co-employer was a material change in circumstances that so radically affected the relationships at the bargaining table that the employees lacked any knowledge of the true context in which they voted for unionization. The Employers pray for the Supreme Court to reverse the Sixth Circuit decision enforcing the Board Order.

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[3] After the AFSCME v. Mental Health Dep't. decision, the Michigan legislature amended the Public Employees Relations Act (PERA). M.C.L. § 423.201(e). The amendment statutorily defined employees who worked for a private entity under contract with the State as private sector employees, and therefore, not protected by the PERA.

SUMMARY OF THE ARGUMENT

The representation elections should be invalidated because the elections were conducted under the pervasive misrepresentation that the State of Michigan was a joint employer, thus denying the employees "right to a free and fair choice". Van Dorn Plastic Mach. Co. v. NLRB, 736 F.2d 343, 347 (6th Cir. 1984).

The Sixth Circuit incorrectly enforced the Board Order that extended the jurisdictional holding of Management Training Corp., 317 NLRB 1355 (1995), to the substantive issues of the present case. As a result, the Sixth Circuit failed to apply the proper legal analysis, articulated in Mitchellace, Inc. v. NLRB, 90 F.3d 1150 (6th Cir. 1996), and its progeny, to determine whether the misrepresentation that the State of Michigan was a joint employer justified invalidating the elections. Based on the timing and extent of the misrepresentation that the State of Michigan was a joint employer, the inability of the Employers to respond to its departure, and the effect this had on the elections, the elections must be invalidated.

The use of Board comity to recognize the elections is inappropriate due to inconsistency between state and federal agency rulings, and to uncertainty as to the true desires of the employees. Mental Health Center of Boulder County, Inc., 22 NLRB 901, 902 (1976). The material change in circumstances by the removal of the State of Michigan from the process frustrated the employees' exercise of free choice, and justifies invalidating the elections. NLRB v. Parson's School of Design, 793 F.2d 503 (2d Cir. 1986).

ARGUMENT

I. MANAGEMENT TRAINING RESOLVED A JURISDICTIONAL ISSUE AND SHOULD NOT BE EXTENDED TO DETERMINE THE SUBSTANTIVE ISSUE OF WHETHER TO INVALIDATE THE ELECTIONS.

A. The holding of Management Training should not be extended beyond issues of NLRB jurisdiction.

The Sixth Circuit incorrectly upheld the Board's decision to validate the elections. The facts and circumstances demonstrate that the elections failed to reflect the true desires of the employees, and that misrepresentations adversely affected the Employers' due process rights.

The Sixth Circuit's decision to enforce the Board's Order is erroneous. Contrary to the Sixth Circuit's holding, the employees were misled by the status of the MDMH at the time of the elections.

The employees voted for union representation with the understanding there would be two employers. One of the employers, the State of Michigan, had the purse strings. The State of Michigan, and its purse strings, became noticeably absent after the election. The unions hope to collect their union dues from already scant Employee wages. The Employers, however, have been left holding an empty bag.

The Board's holding in Management Training Corp., 317 NLRB 1355 (1995), should not be extended to determine the substantive issue of whether state conducted elections should be invalidated. In Management Training, the Board

refrained from an analysis of the joint employer issue, as well as of the subjects over which the parties should bargain. The impact of Management Training is procedural. The Sixth Circuit failed to analyze the substantive issues pertaining to the disputed elections under the appropriate law. The issue in Management Training was whether the Board could assert jurisdiction over an employer with close ties to a government controlled entity, not whether the Board should recognize state conducted elections. The issue in Management Training was jurisdiction, not Board comity.

The jurisdictional change encompassed by Management Training should not affect the substantive rights of the parties, but "simply changes the tribunal..." Hallowell v. Commons, 239 U.S. 506, 508-09 (1916). The Sixth Circuit's analysis is improper because it allowed a change in jurisdiction to erode substantive rights.[4] Whether the Board extends comity to the challenged state conducted elections is outcome determinative of the Employees' and Employers' economic futures. New elections would not require the Board

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[4] Cases decided subsequent to Management Training have also declined to expand its holding beyond the jurisdictional issue. See, ARA Services, Inc. v. NLRB, 71 F.3d 129 (4th Cir. 1995); Aramark Corp. v. NLRB, 179 F.3d 872 (10th Cir. 1999); Teledyne Economic Dev. v. NLRB, 108 F.3d 56 (4th Cir. 1997); International Union of Operating Eng'rs. v. NLRB, 940 F.Supp. 1439 (D.Minn 1996); AFSCME v. Mental Health Dept., 545 N.W.2d 363, 215 Mich.App. 1 (1996); D & T Limousine Service, Inc., 320 NLRB 859 (1996); Saipan Hotel Corporation, 320 NLRB 192 (1995) and 321 NLRB 116 (1996); Spectrum Healthcare Services, Inc., 325 NLRB 198 (1998); and Operating Eng'rs. Local 70, 152 LRRM (BNA) 2862 (No. 3-96-10, June 17, 1996).

to unnecessarily broaden the holding of Management Training.

B. The Sixth Circuit failed to apply the proper legal test to determine whether to set aside the elections.

Management Training clarifies federal labor law jurisdiction, it does not speak to the issue of whether an election should be invalidated. The rule is that the parties, not the Board, should decide the substantive topics over which they will bargain. "[I]t is for the parties to determine whether bargaining is possible with respect to other matters and, in the final analysis, employee voters will decide for themselves whether they wish to engage in collective bargaining under those circumstances." Management Training, 317 NLRB at 1358.

Board policy as articulated in Management Training supports the Employers' position. The parties to the instant case have not conducted a campaign that truly reflects the facts and circumstances as they exist. The employees lacked the opportunity to evaluate the value, or detriment, of union representation given the removal of the State of Michigan.

The Sixth Circuit's claim there was "every opportunity" for the Employers to present evidence that Employees were being misled as to the status of the State of Michigan is simply untrue. Michigan Community Servs., et al. v. NLRB, 309 F.3d 348, 358 (6th Cir. 2002). Had the Employers even thought to raise the issue, the union would have filed an unfair labor practice charge against the Employers. The law at the time of the union elections stated the State of Michigan was a co-employer. For the Sixth

Circuit to suggest that the Employers missed an opportunity to mis-state the law is erroneous.

The Sixth Circuit wrongfully rejected the Employer's contention that the contracts between the Employers and the State precluded the Employers and their employees from bargaining with the state over improved wages, benefits, and staffing levels. Residential Systems accurately describes the relationship, which is even more adhesive in nature now than at the time it was decided. The State of Michigan, like virtually every state in the United States, faces severe budget cuts. Employers have no strength from which to bargain with the state. The Sixth Circuit speculated that because Board recognition of the elections now authorized employees to strike, a right not afforded to them under state law, it was "not very likely that the absence of the MDMH at the bargaining table would have affected employee views and attitudes about union representation . . . ." Mich. Community Servs. et al. v. NLRB, 309 F.3d 348, 359 (6th Cir. 2002). The Sixth Circuit's Opinion misses the mark.

The right to strike was rightfully never discussed during the election campaigns because it did not exist under Michigan law. The fact that the employees now have that right is another example of a materially changed circumstance that surfaced after the elections. Had the Employers known that the right to strike was part of the cost of unionization, the Employers could have voiced their concerns during the election campaigns. It is error for the Sixth Circuit to reject the Employers' undeniably objective claim that the departure of the state from co-employer status so altered the nature of the elections that the elections must be invalidated.

The Sixth Circuit's contention that employees may pursue a decertification petition if they are not well-served by

union representation is also erroneous. The Sixth Circuit's contention puts the cart before the horse. There is no valid reason to engage in the expensive and time-consuming process of decertification to invalidate elections that never should have been validated.

II. THE ELECTIONS MUST BE INVALIDATED BECAUSE THE MISREPRESENTATION THAT THE STATE OF MICHIGAN WAS A JOINT EMPLOYER AFFECTED THE FREE AND FAIR CONDUCT OF THE ELECTIONS.

The State of Michigan's departure from the bargaining table after the elections misrepresented the issue placed before the voters at election time. The State of Michigan's departure deprived the Employers of the opportunity to campaign against unionization, if they so desired, on the basis that the State of Michigan's departure from the bargaining table increased the likelihood that wages, benefits, or working conditions, which the state continued to control, were beyond the scope of collective bargaining.

The issue is whether the misrepresentation that the State of Michigan was a joint employer, "interfered with the employee's exercise of free choice to such an extent that it materially affected the results of the election." NLRB v. Superior Coatings, Inc., 839 F.2d 1178, 1180 (6th Cir. 1988). The Sixth Circuit has consistently recognized that:

> [t]here may be cases where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected. Van Dorn

Plastic Mach. Co. v. NLRB, 736 F.2d 343, 348 (6th Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

The misrepresentations in the present case, albeit not the offspring of deceit or guile, were pervasive and immune from challenge at the time of the elections. The misrepresentations denied employees a free and fair choice based upon the truth. In Mitchellace, Inc. v. NLRB, 90 F.3d 1150 (6th Cir. 1996), this Court held that the factors for setting aside elections based on misrepresentations include: "(1) the timing of the misrepresentation; (2) whether the employer had the opportunity to respond; (3) the nature and extent of the misrepresentation; (4) whether the source of the misrepresentation was identified; and (5) whether there is evidence the employees were affected by the misrepresentation." NLRB v. Gormac Custom Mfg., Inc., 190 F.3d 742, 747 (6th Cir. 1999), *citing* Mitchellace, 90 F.3d at 1155.

The Mitchellace analysis is appropriate in this case because all parties involved with the election were subject to the misrepresentation that the State of Michigan was a joint employer. The pervasive manner of this misrepresentation prevented the Employers from presenting the facts of their financial situation to the voters, led all parties to believe that the resources of the State of Michigan would shape the collective bargaining process, and led employees to vote as if they were state employees.[5]

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[5] The Employers have no other source of funds from which to pay salaries and have customarily passed on contractual increases in Schedule A to employees, as unexpended funds must be returned to the state.

The Sixth Circuit incorrectly criticized Petitioners' reliance on Mitchellace, Inc. v. NLRB, 90 F.3d 1150, 1155 (6th Cir. 1996). The Sixth Circuit wrongly held that there was no misrepresentation in the record that Petitioners' employees were misled by the status of the MDMH at the time of the elections.

The Sixth Circuit's analysis is wrong and simplistic. Until the Board made an about-face with its decision in Management Training, the MDMH had lost its argument against co-employer status every step of the way. In AFSCME v. Mental Health Apartment, 545 N.W.2d 363; 215 Mich.App. 1 (1996), the Michigan Court of Appeals relied on the Board's decision in Management Training as the basis upon which it vacated all decisions of the MERC requiring Employers and the MDMH to bargain with the unions.

The effect of the misrepresentation radically disturbed the "laboratory atmosphere" surrounding the elections. The parties were misled into voting under assumptions inconsistent with reality.

A. The misrepresentation persisted throughout the election process.

Where a misrepresentation persisted throughout the election, the Court should set the election aside. The timing of a misrepresentation should be evaluated in light of its effect on the outcome of the election. Mitchellace, 90 F.3d at 1155.

For example, in NLRB v. Hub Plastics, 52 F.3d 608 (6th Cir. 1995), the union falsely reported to employees two days before the election, using a Board charge form, that the employer was liable for unfair labor practices. Because the damage to the employer's credibility impinged on the "free

and fair choice" of the employees, the case was remanded. Id. 52 F.3d at 612-613.

Similarly, in NLRB v. St. Francis Healthcare Centre, 212 F.3d 945 (6th Cir. 2000), the Sixth Circuit held that representation elections could be set aside where a letter sent to the homes of employees three days before the election contained the misrepresentation that the employer secretly granted raises to management. The Sixth Circuit also held that an election could be set aside in NLRB v. Gormac Custom Mfg., Inc., 190 F.3d 742 (6th Cir. 1999), where a factually false union flyer was disseminated hours before the election. Id. at 747-748.

Here, the misrepresentation that the State of Michigan was a joint employer persisted until after employees cast their ballots. Similarly and more recently, the Supreme Court of the State of Minnesota ruled that Minnesota election officials were compelled to provide supplemental absentee ballots to citizens who had already voted after Minnesota Senator Paul Wellstone was killed in a plane crash just before the election. The Minnesota Supreme Court correctly recognized that voters must know who they are voting for when they cast their ballots. The Sixth Circuit should have invalidated the elections on similar grounds.

B. The misrepresentation was not discovered until it was too late for the Employers to present the true nature of their financial situation.

The Employers were unable to respond to the misrepresentation because it was not revealed until after the elections. When employers or employees lack the opportunity to respond to a misrepresentation, it supports invalidating the

election. As in Hub Plastics, Gormac, and St. Francis, the timing of the misrepresentation in this case precluded a response by the Employers. Here, the Employers did not learn of the misrepresentation until the Michigan Court of Appeals decided AFSCME v. Mental Health Dept., 545 N.W. 2d 363, 215 Mich.App. 1 (1996), after the elections were over.

Had the Employers known of the reality of the situation before the elections, they would have filed objections. The timing and nature of the misrepresentation denied the Employers the opportunity to present the nature of their financial situation, their range of managerial authority, and the ramifications of collective bargaining absent state participation. The employees were not informed as to the truth about their employment situation, a factor that cuts in favor of reversing the Sixth Circuit Opinion.

C. The misrepresentation directly affected the identity of the Employer.

1. The removal of the State of Michigan from collective bargaining destroyed the Employers' ability to negotiate wage increases and working conditions.

Wages, and the extent to which the employer can increase them, go to the very heart of this case. The magnitude of the misrepresentation in this case cannot be overemphasized. When the employees voted for union representation, it was with the belief that the State of Michigan, the source of wages, was to be present at the bargaining table. The state's departure from the bargaining

process virtually eliminated the subject of wage increases from the scope of bargaining.

The issue is whether an employer's financial condition can be so misrepresented to the employees "as to preclude free choice." LaCrescent Constant Care Center, Inc. v. NLRB, 510 F.2d 1319, 1322 (8th Cir. 1975). In LaCrescent, the State of Minnesota imposed an 18 month freeze in the level of reimbursement for the care of state-assisted patients at the employer's facility. The Regional Director found that the union had "misstated the financial standing and status of the employer so as to induce members of the bargaining unit to believe that the employer was 'profiteering' at the expense of members of the bargaining unit." Id. at 1320, n. 3. The court noted that "a point may be reached where the pre-election propagandizing has created an atmosphere rendering the free choice of a bargaining agent by the employees highly improbable. In such event the election must be invalidated." Id. at 1322.

LaCrescent is factually similar to the case at bar. Any misrepresentation regarding wages "cannot be considered trivial." Id. 510 F.2d at 1323, n. 20. LaCrescent held that whether the misrepresentation was deliberate is not a determinative factor in deciding to invalidate election results. Id.

A free and fair result in this case demands that the elections be invalidated. The misrepresentation concerns wages, "the stuff of life for Unions and members, the self-same subjects concerning which men organize and elect their representatives to bargain." Id. at 1322, *citing* NLRB v. Houston Chronicle Publishing Co., 300 F.2d 273, 280 (5th Cir. 1962). The court in LaCrescent recognized that it was "far fetched" to suggest that the employees independently

possessed the expertise to evaluate the union's misstatements, and to evaluate the financial condition of the employer. LaCrescent, 510 F.2d at 1323, n.20.

The Sixth Circuit failed to engage in an analysis of the impact of unionization on wages in this case. The complexity of the interrelationships between the State of Michigan Department of Mental Health, the state judiciary, the MERC, the Board, and the parties to the election robbed employees and Employers of a clear understanding as to the impact of the union elections. The fact that the state is not a co-employer limits flexibility at the bargaining table beyond the wages issue. The state continues to license adult residential care homes and to dictate the number of employees required per shift in each home, the level of care that must be followed, and other various health and safety issues.

Before AFSCME v. Mental Health Dep't., 545 N.W.2d 363, 215 Mich. App. 1 (1996), the state's conduct was subject to the jurisdiction of the MERC. Currently, the state's power to change terms and conditions of employment that affect individual employees is virtually unlimited. Whereas the MERC could intervene on behalf of charges brought before it, the Board lacks analogous jurisdiction over the State of Michigan. The result is that the State of Michigan dictates to the Employers the terms and conditions of employment in the same manner that it previously enjoyed, without being held subject to review by a governmental agency such as the MERC or the Board.

2. The State of Michigan's departure from the collective bargaining process so materially altered the identity of the Employers that recognition of the elections violates the Act.

Misrepresentation as to the parties to an election justifies invalidation. The Board has refused to certify an election where co-employers have "abandoned joint action." Association of Motion Picture Producers, Inc., 88 NLRB 1155, 1160 (1950). In Motion Picture Producers, two separate studios jointly conducted their collective bargaining efforts. Employees from two separate studios cast their votes in one election, in which all parties campaigned. Following the election, one of the studios severed its relationship with the association, declared the election invalid, and broke off bargaining.

The Board held the two Employers had pursued individual courses of action with respect to their labor relations and set the election aside. Similarly, in the case at bar, the Employers should not be obligated to engage in collective bargaining when the State of Michigan extricated itself from the employment relationship by amending the PERA. The state abandoned joint action to avoid unionization. The Employers should not be singled out with an obligation to bargain because of the state's departure.

The State of Michigan's extensive involvement in the election process painted the proceedings with the authority of state government. The election supervisor was a state employee. AFSCME took the legal position that the State of

Michigan was a joint employer.[6] The mail ballot election procedures are captioned with the heading "Michigan Employment Relations Commission." The ballot counting instructions and procedures have similar letterhead. The election results were tallied and recorded at state offices by a state employee.

The knowledge of who would be paying for anticipated wage increases was not available to the employees or Employers. The evidence presented overwhelmingly supports reversal of the Sixth Circuit's Opinion.

D. As the source of the misrepresentation can be traced to state action, all parties were justified in their reliance on the misrepresentation as something other than propaganda.

Due to the fact that the state, the Employers, and the unions all perpetuated the misrepresentation, the employees could not discern the falsity of the pretense that the state was a joint employer prior to casting their ballots. Where the source of the misrepresentation is ambiguous, courts have invalidated the elections. NLRB v. St. Francis, 212 F.3d 945, 965 (6th Cir. 2000). In St. Francis, a letter sent by the union alleging that management received secret raises bore the signature of a former employee from the employer's human resources department absent indicia of union responsibility. Because the letter did not suggest union sponsorship,

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[6] The individual Employers have consistently taken the position that the State of Michigan, because of its extensive involvement in the employment relationship, should have been considered a co-employer for liability and collective bargaining purposes.

employees could not discern that it was propaganda. The ambiguity supported invalidating the election. Id. 212 F.3d at 965.[7]

In the present case, the employees were unable to discern the truth or untruth of the misrepresentation. As in St. Francis, employees could not evaluate the truth of the misrepresentation because it was commonly accepted that the state would be a partner in the bargaining process. The confusion shared by all parties over the central issue warrant invalidating the elections.

E. The misrepresentation affected the elections.

The election campaigns led employees to believe that the State of Michigan would be a full participant in the collective bargaining process. Where a misrepresentation is likely to have affected the outcome of an election, the election should be invalidated. In Gormac, a flyer creating a false impression of union support was held to have affected the election. "It is quite possible that (voters who) saw the flyer, concluded that their vote would not matter since it was a foregone conclusion that the Union would win, and decided not to vote." Id. 190 F.3d at 749-750.

Had employees known in the present case that the State of Michigan would ultimately not participate in collective bargaining, the result of the election could easily have been different. Without the misrepresentation regarding

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[7] Conversely, the flyer at issue in Gormac identified the authorship of the United Steelworkers of America, thus allowing employees to discern the motives of the disseminating party. Id., 190 F.3d at 749.

the state's involvement, employees could have weighed the extraction of union dues out of modest earnings against the improbability of the union securing higher wages or different working conditions. The union's refusal to assent to new elections is evidence that the misrepresentation unfairly adhered to the union's benefit. The elections must be invalidated.

III. THE SIXTH CIRCUIT ERRED WHEN IT ENFORCED THE BOARD'S ORDER APPLYING BOARD COMITY TO THE STATE CONDUCTED ELECTIONS.

The Sixth Circuit inappropriately affirmed the Board's invocation of Board comity to validate the state-conducted elections. Comity is typically employed because, "[i]n most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law." Bush v. Gore, 121 S.Ct. 525, 534 (2000) (Rehnquist, CJ., concurring).

The Board's recognition of a state election by comity is distinct from judicial comity. Comity as applied in the labor context, or "Board comity," "is a notion of highly uncertain content." Long Island College Hospital v. NLRB, 566 F.2d 833, 841 (2d Cir. 1977). A primary focus in Board comity is whether state-conducted elections reflect the true desires of the employees and are consistent with federal policy under the Act. Mental Health Center of Boulder County, Inc., 22 NLRB 901, 902 (1976). Board comity is a rule of convenience meant to support settled relationships. The Court in Long Island College emphasized, "that the NLRB is not required [or permitted] to defer to state proceedings where federal policy would be undermined." Long Island College, 566 F.2d at 841-842 (emphasis added).

The application of Board comity to the case at bar fails to promote comity's stated objectives of convenience and economy. "Comity is not a rule of law, but rather a rule of practice, convenience, and expedience . . . [which] has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question . . . its obligation is not imperative . . . ." Mast, Foos, & Co. v. Stover Mfg. Co., 177 U.S. 485, 488-89 (1900) (emphasis added).

The application of Board comity in the present case serves neither expedience nor convenience. The Union has attempted to gain majority status through protracted litigation. If the Union is confident of its degree of support within the rank and file of employees, then the Union should demonstrate, "no hesitation in submitting to the polls." Long Island College, 566 F.2d at 846.

Application of Board comity in this matter undermines the doctrine of federal preemption. Board comity is typically applied in situations where there is no conflict between the state conducted election and its federal counterpart.[8] The Michigan Court of Appeals decided AFSCME v. Mental Health Dep't., 545 N.W.2d 363, 215 Mich.App. 1 (1996), on the basis of federal preemption. "Because conflict is the

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[8] Board comity is distinguished from judicial comity in that federal courts defer to the decisions of state courts, not state conducted elections. Elections do not provide a final "adjudication." When the common law courts applied comity to foreign decisions the result was an adjudication on the merits carrying the effects of res judicata and collateral estoppel. Elections do not enjoy this finality and may be challenged. Employees also have the right to change their votes in new elections as circumstances and desires change.

touchstone of pre-emption," the legal parallel is that comity should not be extended over the state conducted elections. Smith v. Evening News Ass'n., 106 N.W.2d 785, 362 Mich. 350 (1961), reversed, 371 U.S. 195 (1962)(action not preempted), *citing from* Hill v. Florida, 325 U.S. 538 (1944).

In AFSCME v. Mental Health Dep't., 545 N.W.2d 363; 215 Mich App 1 (1996), the Michigan Court of Appeals vacated the cases in which the State appealed its joint employer status "on the ground that the MERC's jurisdiction is preempted by the National Labor Relations Act (NLRA)." 545 N.W.2d at 365, 215 Mich.App. 1 (1996). Because the central dispute in AFSCME v. Mental Health Dep't. was based upon a conflict in law, application of comity over MERC conducted elections is inappropriate.

The preemptive basis of AFSCME v. Mental Health Dep't. highlights the conflict between federal and state law and signals the limitations of comity as a remedy. Comity requires that the context in which the state and federal elections took place be similar. It was inappropriate for the Sixth Circuit to affirm the Board's decision to extend comity over the elections.

IV. THE FAILURE TO INFORM EMPLOYEES OF THE MATERIAL CHANGES SURROUNDING THE ELECTIONS IS UNFAIR AND CONSTITUTES GROUNDS FOR INVALIDATING THE ELECTIONS.

Employees must be given sufficient notice of material changes prior to casting their votes for representation. The issue is whether union elections should be invalidated where the voters were uninformed and misled. In NLRB v. Parson's School of Design, 793 F.2d 503 (2d Cir. 1986), an election

took place with two ballot boxes, one for full-time faculty and the other for part-time faculty. Neither the union nor the Board explained the separate boxes. After the election, the Board determined that the unit consisted of only part-time employees. Id. 793 F.2d at 504-505.

The employer objected that instructors who voted for the union might not have done so had they known that the unit would consist only of part-time instructors. The court held that the part-time instructors may have expected that full-time faculty would have assumed most of the responsibility for collective bargaining. The court also hypothesized that the employees may have wanted to see their bargaining strength maximized by having the entire unit represented by a union. Id. 793 F.2d at 506.

Parson's resembles the case at bar. The Union has erroneously argued that because no exceptions were filed to the elections, the election results cannot be challenged. However, the Parson's court attached "no significance to Parson's failure to raise its objections prior to the election . . . ." Id. 793 F.2d at 507, because Parson's "had no basis for a complaint . . . until the Board decided to overturn the Regional Director's determination." Id. Similarly, in this case, the Employers had no basis to file exceptions to the election during the statutory period because the change in circumstances occurred afterward.

As Parson's noted, it is unfair to penalize the parties for the failure of either party to raise objections to an issue that did not arise until after the elections. Here, the union, the Employers, and the employees were ignorant of the fact that a change in law would materially alter the relationship into which the parties had entered.

Employees would hardly have voted for a decrease in their wages to finance a union dues deduction, in light of the improbability of wage increases at the bargaining table. The Michigan Court of Appeals' decision in AFSCME v. Mental Health Dep't. in no way limited the state's power to alter wages, contracts, or any other term or condition of employment that the state controls. The reality is similar to that depicted in Parson's in that the individual employee's influence upon the collective bargaining process has significantly decreased.

Due process notions of fairness require that the employees know what they are voting for. In SDC Investments, Inc., 274 NLRB 556 (1985), a union seeking certification prepared a handwritten Spanish translation of the official NLRB ballot to which the language "Remember to vote yes on December 16th," had been added. Id. 274 NLRB at 557. Because the Board believed that Spanish-speaking members of the bargaining unit may have been misled into thinking that the document was prepared by the Board, the election was invalidated.

In contrast, where the election procedure "informed the voters of the possible alternatives in the selection of the bargaining unit . . . and permitted them to vote accordingly," election results have been upheld. Sears, Roebuck & Company v. NLRB, 957 F.2d 52, 56 (2d Cir. 1992), citing Hamilton Test Systems v. NLRB, 743 F.2d 136, 141 (2d Cir. 1984). In Sears, the Regional Director purposefully withheld a determination on the unit placement of certain store employees.

The Regional Director, however, informed the employees of the disputed unit determination by posting a notice several weeks before the election. Sears personnel

incorrectly posted the initial notice with the relevant section hidden from view. The error in posting was corrected before the election. Sears also explained the Regional Director's position regarding the unit determination at an employee meeting before the election. The court in Sears found that once the notice was corrected, employees had access to information that led to an understanding of the issues as they approached the ballot box. Id. 957 F.2d at 56.

Our case is much more like Parson's, and SDC Investments than it is like Sears. The Sears employees were notified that the makeup of the store's bargaining unit would be determined after the election. Sears employees were even informed of alternative consequences of the election. The employees in Sears knew that all decisions regarding unit determination had not been made and continued to cast their votes in favor of representation. To compare, the employees in Parson's did not know the potential impact of unit changes before the election. In SDC Investments, the voters were not aware of who urged them to "vote yes on December 16th." Because the information was received after the elections, the Board invalidated the elections.

In this case, the changed circumstances after the elections have led to unwanted results. The Michigan Court of Appeals and the Michigan legislature have eliminated the State of Michigan as a joint employer. The changed circumstances have made it impossible to determine whether the election results reflected the true desires of the employees. The elections must be invalidated.

CONCLUSION

Being erroneous, the Opinion of the Sixth Circuit must be REVERSED. The elections must be invalidated. The Writ requested should ISSUE.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 00-2192/00-2440/00-2451

[Filed October 30, 2002]

MICHIGAN COMMUNITY SERVICES, INC., et al.,
Petitioners/Cross-Respondents
(00-2192),

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES (AFSCME), AFL-CIO,
Petitioner/Cross-Respondent
(00-2451),

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner
(00-2440),

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES (AFSCME), AFL-CIO; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL

IMPLEMENT WORKERS OF AMERICA,)
AFL-CIO; SUMMER'S LIVING SYSTEMS,)
INC., et al.,)
Intervenors.)
)

On Petitions for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board
Nos. 7-CA-38546(2), et al.

JUDGES:
Before: SILER, COLE, and CLAY, Circuit Judges.

OPINION

CLAY, Circuit Judge. Michigan Community Services, Inc. and twenty-eight other non-profit corporations (collectively "MCS"), which are licensed by the State of Michigan to provide residential care for developmentally disabled adults in a residential setting, appeal in Case No. 00-2192 from the final decision and order entered by the National Labor Relations Board ("the NLRB" or "the Board") in *Summer's Living Systems, Inc.*, 2000 N.L.R.B. LEXIS 655, 2000 WL 1460041 (NLRB 2000) (unpublished) in which the NLRB declined to set aside union representation elections and held that MCS engaged in unfair labor practices under § § 7 and 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § § 157, 158(a)(1) and (5) ("the Act") by refusing to bargain collectively with the American Federation of State, County & Municipal Employees, AFL-CIO ("AFSCME"), and the International Union, United Automobile, Aerospace and Agricultural Implement Workers

of America, AFL-CIO ("UAW"), (collectively, "the Unions"), after the unions won the elections. In Case No. 00-2440, the NLRB has cross-petitioned for enforcement of the order; the Unions have intervened in support of the NLRB's cross-petition. In Case No. 00-2451, AFSCME seeks review of the NLRB's decision and order in *Summer's Living Systems* dismissing unfair labor practice allegations against Summer's Living Systems, Inc. and eight other employers (collectively "SLS") that own residential care facilities. SLS has intervened in opposition to AFSCME's petition.

In *Summer's Living Systems,* the Board issued a decision and order affirming the decision made by the administrative law judge ("ALJ") to extend comity to the union representation elections conducted by the Michigan Employee Relations Commission ("MERC") in thirty residential care facilities owned by MCS that took place before *Management Training Corp.*, 317 N.L.R.B. 1355 (1995) was decided, but not to extend comity to the MERC-conducted elections in the residential care facilities owned by SLS that took place after *Management Training* was decided on the ground that MERC lacked jurisdiction to conduct those union representation elections. In *Management Training,* the Board, overruling the jurisdictional test set forth in *Res-Care, Inc.*, 280 N.L.R.B. 670 (1986), decided that it had jurisdiction over an employer with close ties to an exempt governmental entity, as defined under 29 U.S.C. § 152(2). Accordingly, the Board upheld the unfair labor practice complaints filed against MCS, but dismissed those filed against SLS. For the reasons set forth below, we **DENY** the petitions for review by MCS in Case No. 00-2192 and by AFSCME in Case No. 00-2451, and **ENFORCE** the Board's order in Case No. 00-2440.

BACKGROUND

The present case concerns a dispute between a group of Michigan non-profit corporations operating group homes providing residential care and services to individuals with disabilities (collectively "the Employers") and the Unions representing their employees regarding the employees' rights to choose union representation under § 7 of the Act. The State of Michigan Department of Mental Health ("MDMH") funds the Employers' operations through annual contracts that establish defined limits upon wages and benefits that the Employers may pay. In 1985, the Unions began organizing efforts at the Employers' residential care facilities, with AFSCME filing several election petitions with the Board's regional office in Detroit, Michigan, seeking to represent the employees of the Employers operating under contracts with MDMH. In *CK Homes, Inc. v. AFSCME*, an unpublished decision of the NLRB Seventh Region Director, decided February 14, 1986 (Case No. 7-RM-1275) and *Residential Systems v. UAW*, an unpublished decision of the NLRB Seventh Region Director, decided April 7, 1988 (Case No. No. 7-RC-18529), the Board, relying primarily upon *Res-Care Inc., 280 N.L.R.B. 670 (1980),* dismissed AFSCME's petitions, citing lack of subject-matter jurisdiction under the Act on the basis that the State of Michigan was an exempt governmental entity.

Thereafter, on January 28, 1988, AFSCME filed petitions with MERC seeking to represent the employees of the Employers' separate units, naming MDMH and the group home providers as joint employers. MDMH opposed the petitions naming it as a joint employer, claiming that MERC's jurisdiction over each private employer was preempted as a

matter of federal labor policy. After finding that the named employers were joint employers, MERC asserted jurisdiction over MDMH under the Michigan Public Employment Relations Act ("PERA"), Mich. Comp. Laws Ann. § § 423.201-423.216, and over the group home providers under the Michigan Labor Mediation Act ("MLMA"), Mich. Comp. Laws Ann. § § 423.1-423.30. In asserting jurisdiction, MERC relied upon the Board's refusal to assert jurisdiction over the group home providers under the Act and the decision of the Michigan Civil Service Commission not to classify the employees of the group homes as state civil service employees. *See AFSCME v. La. Homes, Inc./Mich. Dep't of Mental Health*, MERC Case No. R88 C-112, 1989 MERC Lab Op 51, 1990 MERC Lab Op 491, *aff'd, AFSCME v. La. Homes*, 192 Mich. App. 187, 480 N.W.2d 280 (Mich. Ct. App. 1991), *appeal denied*, 487 N.W.2d 410 (Mich. 1992), *vacated*, 503 N.W.2d 442 (Mich. 1992), *reaff'd on remand*, 203 Mich. App. 213, 511 N.W.2d 696 (Mich. Ct. App. 1994), *appeal denied*, 521 N.W.2d 607 (Mich. 1994), *cert. denied sub. nom., Mich. Dep't of Mental Health v. Louisiana Homes, Inc.*, 513 U.S. 1077, 130 L. Ed. 2d 629, 115 S. Ct. 724 (1995) ("*Louisiana Homes*").

MERC then directed and conducted elections involving the joint employers, as authorized by PERA. After elections were conducted on April 20, 1989, the ballots were impounded, but eventually counted by MERC on June 29, 1990. The Unions won each election.[1] As a consequence, MERC certified the bargaining representatives, giving unit

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[1] AFSCME won all the elections, except for one that was won by the UAW.

employees bargaining rights with respect to MDMH and their private employers, as joint employers. MDMH, however, refused to honor MERC's certifications and challenged them in state court, seeking judicial review of the MERC's assertion of jurisdiction by claiming that it was not a joint employer of the subject-unit employees and contending that the Act preempted state law. MERC's assertion of jurisdiction was eventually upheld on appellate review in the *Louisiana Homes* litigation. Throughout the appellate proceedings, the Employers took the same position as AFSCME, that they and MDMH were joint employers subject to MERC's jurisdiction which was not preempted by the Act. During this time, however, no bargaining in the certified units took place because the Employers were unwilling to participate in bargaining if MDMH was also not a participant.

After the United States Supreme Court denied MDMH's petition for a writ of certiorari in the *Louisiana Homes* case on January 9, 1995, bargaining eventually commenced, but did not last long. In mid-1995, the Board announced a change in policy in *Management Training*, overruling the test stated in *Res-Care* and declaring that it had jurisdiction over private employers under contract with exempt state agencies. In light of the Board's decision in *Management Training*, MDMH petitioned the Michigan Court of Appeals to reconsider and reverse its previous decision finding that MERC's jurisdiction was not preempted as a matter of federal labor policy. Thereafter, on January 26, 1996, the Michigan Court of Appeals, in reliance upon *Management Training*, vacated MERC's decisions requiring the Employers and MDMH to bargain with the Unions in all the adult residential care cases before MERC, concluding that MERC's jurisdiction was preempted as a matter of federal

labor policy. *AFSCME v. Mental Health Dep't.*, 215 Mich. App. 1, 545 N.W.2d 363 (Mich. Ct. App. 1996).[2] Thus, the Michigan Court of Appeals held that the adult residential care providers that contracted with MDMH were properly under the jurisdiction of the Board. As a result, MDMH and the Employers were relieved of any duty to bargain under state law. Thereafter, the Michigan Court of Appeals, in an order entered on March 14, 1996, denied AFSCME's motion for rehearing, but granted its motion for a stay.

In the meantime, after the Board's decision in *Management Training*, but before the Michigan Court of Appeals ruled on the federal preemption issue in *AFSCME v. Mental Health Dep't*, AFSCME proceeded with elections that previously had been directed by MERC, though not yet conducted. AFSCME won those union representation elections involving the employees of units of Summer's Living Systems, Inc. and eight other employers ("SLS"). However, following the Michigan Court of Appeals' decision in *AFSCME v. Mental Health Dep't* vacating MERC's certifications on preemption grounds, the State of Michigan refused to bargain with the Unions. When the Unions requested that the Employers continue to bargain under the Act without MDMH's participation, the Employers refused, claiming that the changed circumstance--the absence of MDMH from the bargaining process--undermined the efficacy

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[2] After the decision in *AFSCME v. Mental Health Dep't*, 215 Mich. App. 1, 545 N.W.2d 363 (Mich. Ct. App. 1996), the Michigan legislature amended PERA at Mich. Comp. Laws Ann. § 423.201(1)(e) to define employees who worked for a private entity under contract with the State as private sector employees, and therefore not protected by PERA.

of MERC's elections as a basis for requiring the Employers to bargain as a matter of federal labor policy. Thus, all collective bargaining came to a halt. The Unions contacted the Board on March 18, 1996, formally demanding bargaining by the Employers.

Thereafter, the Unions filed unfair labor practice charges with the Board against thirty-eight of the group home providers contracted by MDMH, alleging refusal to bargain under the Act as the sole employers of employees in the subject units.[3] Based upon the charges filed by the Unions, the Board issued a series of consolidated unfair labor practice complaints alleging that the refusal to bargain violated § 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and (5). After hearings in Detroit, Michigan on January 29 and 30, 1997, the administrative law judge ("ALJ") issued a decision in which he found it appropriate to extend comity to the elections that MERC had conducted when MERC properly had jurisdiction over the private employers.[4] Thus, the ALJ found that MCS violated § 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and (5) by refusing to recognize and

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[3] In this case, there are thirty-eight group home providers and forty units at issue. Two providers, Alternative Services and Carson's AFC, held elections both before and after July 28, 1995, thus accounting for the difference between the number of providers and subject units.

[4] The ALJ's decision is attached to *Summer's Living Systems*. *See* 2000 N.L.R.B. LEXIS 655, 2000 WL 1460041, at *6-39.

bargain with the Unions.[5] In so holding, the ALJ rejected the Employers' argument that the absence of MDMH from the bargaining table represented a changed circumstance that prevented the Board from extending comity to the MERC elections as a matter of federal labor policy. However, with regard to SLS, the ALJ held that its employees had voted in elections conducted by MERC after the Board's announced change in policy preempted MERC's jurisdiction. Thus, the ALJ dismissed the unfair labor practice allegations as to SLS, finding that the principles of comity should not be applied to the MERC-conducted elections due to MERC's lack of jurisdiction.

In its decision issued on September 25, 2000, the Board affirmed the ALJ's decision to extend comity to the MERC elections that took place before *Management Training* was decided on July 28, 1995, but not to extend comity to the MERC elections that took place after *Management Training* was decided "when [MERC] did not have jurisdiction." *Summer's Living Systems, Inc.*, 2000 N.L.R.B. LEXIS 655, 2000 WL 1460041. In its decision, the Board, citing *Standby One Associates*, 274 N.L.R.B. 952 (1985), found that the ALJ correctly applied the Board's comity policy and adopted the findings of the ALJ as to MCS that "(1) the state-conducted elections reflect the true desires of the affected employees; (2) there was no showing of election irregularities; and (3) there was no substantial deviation from due process requirements." *Summer's Living Systems, Inc.*, 2000 N.L.R.B. LEXIS 655, 2000 WL 1460041, at *3. The

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[5] Except for one instance, all the unfair labor practices involved the AFSCME.

Board further found that "for the reasons stated by the [ALJ] . . . the removal of joint employer DMH from the bargaining table is not such an unusual circumstance as to relieve [MCS] from their bargaining obligation." *Id.* Accordingly, the Board, with minor modifications not pertinent to the present appeals, upheld the unfair labor practice complaints filed against MCS, but dismissed the unfair labor practice complaints against SLS.

In its appeal in Case No. 00-2192, MCS contends that the representation elections should be invalidated because the elections were conducted under the misrepresentation that the State of Michigan was a joint employer. According to MCS, "the post-election departure of the State of Michigan from its role as co-employer was a material change in circumstances that so radically affected relationships at the bargaining table that the employees lacked any knowledge of the true context in which their votes for unionization were cast." MCS Br. at 7-8. In Case No. 00-2440, the NRLB cross-petitions for enforcement of its order. On the other hand, AFSCME in its appeal in Case No. 00-2451 argues that the Board erred in not extending comity to the elections that MERC conducted after *Management Training* was decided.

DISCUSSION

Before addressing the merits of the Board's decisions to extend comity to the MERC-conducted elections before the date on which *Management Training* was decided, but not to those conducted after *Management Training* was issued, it is useful to consider the key decisions culminating in the Board's change of policy articulated in *Management Training* regarding its jurisdiction over certain private employers with

contractual relationships with exempt governmental entities. Initially, in *National Transportation Service, Inc. v. Truck Drivers & Helpers of America, Local Union 728*, 240 N.L.R.B. 565 (1979), the NLRB set forth a test for determining whether it would exercise jurisdiction over employers with close ties to an exempt entity:

> In this and future cases involving a determination whether the Board should assert jurisdiction [over an employer with close ties to an exempt entity], we shall determine whether the employer itself meets the definition of "employer" in [29 U.S.C. 152(2)],[6] and, if so, determine whether the employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization

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[6] Section 152(2) provides:

> (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or *any State or political subdivision thereof*, or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 *et seq.*], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. § 152(2) (emphasis added). *See Pikeville United Methodist Hosp. v. USW*, 109 F.3d 1146, 1151 (6th Cir. 1997).

as their representative.

> . . . Once it is determined that the employer can engage in meaningful collective bargaining with representatives of its employees, jurisdiction will be established.

Nat'l Transp. Serv. Inc., 240 N.L.R.B. at 565. Thereafter, in *CK Homes, Inc. v. AFSCME*, an unpublished decision of the NLRB Seventh Region Director, decided February 14, 1986 (Case No. 7-RM-1275), the regional director held that the NLRB would not assert jurisdiction over an employer which was a nonprofit Michigan corporation provider of group homes for mentally disabled persons and which had contracted with the MDMH to provide services to these persons. Applying *National Transportation*, the director found as follows:

> Thus, the Employer may be considered to be tantamount to an administrative arm of the government and not within the definition of [29 U.S.C. 152(2)]. In addition, the control possessed and exercised over the Employer's operations by the State of Michigan makes meaningful collective bargaining impossible. . . . Accordingly, as the Board does not have jurisdiction over the employer, I shall dismiss the petition.

CK Homes at A-9 (J.A. at 272); *Residential Sys. v. UAW*, an unpublished decision of the NLRB Seventh Region Director, decided April 7, 1988 (Case No. No. 7-RC-18529) (J.A. at 274-82).

Subsequently, in *Res-Care, Inc.*, 280 N.L.R.B. 670 (1986), the NLRB reaffirmed the basic test set forth in *National Transportation,* but clarified the latter prong of that test:

> In applying [the *National Transportation*] test, however, we will examine closely not only the control over essential terms and conditions of employment retained by the employer, but also the scope and degree of control exercised by the exempt entity over the employer's labor relations, to determine whether the employer in issue is capable of engaging in meaningful collective bargaining.

Res-Care, 280 N.L.R.B. at 672. On July 28, 1995, the NLRB issued its decision in *Management Training*, overruling the *Res-Care* test and expanding its jurisdiction to include certain private employers who have close ties to exempt governmental entities:

> In *Res-Care*, the Board held that, in deciding whether it would assert jurisdiction over an employer with close ties to an exempt government entity, it would examine the control over essential terms and conditions of employment retained by both the employer and the exempt entity to determine whether the employer in issue is capable of engaging in meaningful collective bargaining. 280 N.L.R.B. at 672. After careful consideration of *Res-Care* and its progeny and for the reasons set forth below, we have decided that

> the test set forth in *Res-Care* is unworkable and unrealistic. Rather, we think that whether there are sufficient employment matters over which unions and employers can bargain is a question better left to the parties at the bargaining table and, ultimately, to the employee voters in each case.
>
> * * *
>
> In determining whether the Board should assert jurisdiction, the Board will only consider whether the employer meets the definition of "employer" under [29 U.S.C. 152(2)] of the Act, and whether such employer meets the applicable monetary jurisdictional standards.[7]

Mgmt. Training, 317 N.L.R.B. at 1358. *See Pikeville United Methodist Hosp. v. USW*, 109 F.3d 1146 (6th Cir. 1997) (holding that, under *Management Training*, the NLRB's jurisdiction was established over a hospital by showing that the hospital was an "employer" as defined by the NLRA, even though the hospital was subject to some local governmental control); *Aramark Corp. v. NLRB*, 179 F.3d 872 (10th Cir. 1999).

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[7] As pointed out in *Management Training:* "Sec. 2(2) excludes from the term 'employer' both Federal and state governmental entities as well as 'political subdivisions thereof.'" 317 N.L.R.B. at 1359 n.17.

In this case, we review *de novo* the Board's legal conclusions regarding whether comity should be extended to the MERC-conducted elections held before and after the issuance of *Management Training,* and its findings of fact under the substantial evidence standard. *Harborside Healthcare, Inc. v. NLRB*, 230 F.3d 206, 208-09 (6th Cir. 2000); *United Parcel Serv., Inc. v. NLRB*, 228 F.3d 772, 774-75 (6th Cir. 2000).

As a legal doctrine, comity originally emerged in the context of international law to reflect the recognition by one state or nation of the laws, policies and judicial acts of another. *See* Black's Law Dictionary, 261-62 (7th ed. 1999) ("The comity principle is most accurately characterized as a golden rule among nations--that each must give the respect to the laws, policies and interests of others that it would have others give to its own in the same or similar circumstances.")(quoting Thomas Buergenthal & Harold G. Maier, *Public Int'l Law in a Nutshell* 178 (2d ed. 1990)). As explained by the Supreme Court in *Hilton v. Guyot*, 159 U.S. 113, 40 L. Ed. 95, 16 S. Ct. 139 (1895),

> "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own

> citizens, or of other persons who are under the protection of its laws.

Id. at 163-64. By extension, the rule of comity also applies to the recognition of federal and state courts of their respective judgments in our federal system of governance. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586, 143 L. Ed. 2d 760, 119 S. Ct. 1563 (1999)("Most essentially, federal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design.") However, "comity," in this sense, is not limited to the recognition of judicial acts. *See Calderon v. Thompson*, 523 U.S. 538, 552, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998) ("Comity is not limited to the judicial branch of a state government.") As used in the present context, "comity" refers to the Board's recognition of state agency proceedings. This use of "comity" was cogently explained by the Second Circuit in *Long Island College Hospital v. NLRB*, as follows:

> "Comity" is a notion of highly uncertain content. The Board refers us to the statement in *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488-89, 20 S. Ct. 708, 710, 44 L. Ed. 856, 1900 Dec. Comm'r Pat. 285 (1900), that
>
> Comity is not a rule of law, but one of practice, convenience and expediency . . . (which) has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question . . . its obligation is not imperative. . . . Comity

> persuades; but it does not command. It declares not how a case shall be decided but how it may with propriety be decided.

The statement, however, was made in a far different context, namely, the extent to which one federal court of appeals should feel itself bound by the decision of another with respect to the validity and scope of a patent. Both courts were governed by the same law and the statement was made in deprecating the appellant's claim that the second court of appeals had given insufficient weight to "comity". More enlightening for this case, although not dispositive, is this court's recent statement in *NLRB v. St. Luke's Hospital*, 551 F.2d 476 (2d Cir. 1976). There we upheld a finding that an employer had engaged in an unfair labor practice by enforcing the union security clause in a collective bargaining agreement with a union certified by the SLRB to represent a unit which could not have been approved by the NLRB because of the "professional" proviso in § 9(b)(1). Rejecting the employer's claim to comity, Chief Judge Kaufman said, *id.* at 482 (citations omitted):

> Arrangements resulting from state agency proceedings should generally be respected if consistent with federal policies. "Comity" in this sense reflects the desirability of supporting settled relationships in the absence of compelling countervailing reasons. It is clear, however, that the NLRB is not required to defer to state proceedings where federal policy would be undermined.

> We would strengthen the last sentence to say "is not required or permitted."

566 F.2d 833, 841-42 (2d Cir. 1977). Thus, as understood by the Second Circuit in *Long Island College Hospital,* "comity" refers to a rule of convenience or expediency whereby the Board sustains settled issues or relationships, so long as federal policy is not undermined.

In this case, the Board, adopting the ALJ's findings, properly extended comity to the MERC elections conducted before the issuance of *Management Training*. Specifically, the Board, citing *Standby One Associates*, 274 N.L.R.B. 952 (1985), found that (1) the state-conducted elections reflected the true desires of the affected employees; (2) there was no showing of election irregularities; and (3) there was no substantial deviation from due process requirements." *Summer's Living Sys., Inc.*, 2000 N.L.R.B. LEXIS 655, 2000 WL 1460041, at *3. First, it would appear that the state-conducted elections reflected the true desires of the affected employees. As pointed out by Intervenor AFSCME, eighty-five percent of the employees in the thirty subject units voted in favor of union representation. Moreover, in nine of the units, there were zero votes cast against union representation. There was also no showing of election irregularities. As Intervenor AFSCME notes, no objections were filed in these elections. Afterwards, there was no decertification petition or challenge to the MERC elections. *Id.*

There was also no apparent deviation from due process requirements. In particular, there was testimony that state-election procedures are as rigorous as the Board's. While MCS suggests that "the State of Michigan's extensive

involvement in the election process painted the proceedings with the authority of state government," MCS Br. at 20, there is no credible evidence that the elections did not accord with due process.

Moreover, the Board properly found that the MERC-conducted elections were consistent with the policies and procedures of the Act. As the Board points out, it has been its long standing policy to recognize as binding the results of state-conducted elections "provided that the state proceedings reflect the true desires of the affected employees, election irregularities are not involved, and there has been no substantial deviation from due process requirements." *Allegheny Gen. Hosp.*, 230 N.L.R.B. 954, 955 (1977), *enforcement denied on other grounds*, 608 F.2d 965 (3d Cir. 1979); *accord Lincoln Park Zoological Soc'y v. NLRB*, 116 F.3d 216, 219-20 (7th Cir. 1997) (extending comity to voluntary recognition of the union where, pursuant to the state public employee relations act, the employer has the initial chance to refuse to recognize a union and the employees had a right to decertify the union but failed to exercise it). Thus, based upon the criteria set forth in *Standby One Associates*, the Board properly extended comity to the MERC-conducted elections.

There is no merit to MCS' claim that the MERC-conducted elections should be set aside based upon the alleged misrepresentation that MDMH was a joint employer in these proceedings. According to MCS, the alleged misrepresentation concerning MDMH's role affected the free and fair conduct of the elections. Specifically, MCS contends that the Board applied the wrong legal standard in evaluating the facts. In support of their claim of misrepresentation, MCS

relies upon the five-factor test announced in *Mitchellace, Inc. v. NLRB*, 90 F.3d 1150, 1155 (6th Cir. 1996). As this Court stated in *NLRB v. Gormac Custom Mfg., Inc.*, 190 F.3d 742 (6th Cir. 1999): "These factors include: (1) the timing of the misrepresentation; (2) whether the employer was aware of the situation and had an opportunity to respond; (3) the extent of the misrepresentation; (4) whether the source of the misrepresentation was identified; and (5) whether there is evidence that employees 'actually were affected' by the misrepresentation." *Id.* at 747 (citing *Mitchellace*, 90 F.3d at 1155). In *Gormac*, this Court added that "another factor that plays a part in our analysis is the closeness of the election." 190 F.3d at 747 (citing *NLRB v. Hub Plastics*, 52 F.3d 608, 613 (6th Cir. 1995)).

What is wrong with this line of attack is that there was no misrepresentation that supports setting aside the elections. Specifically, there was no evidence in the record that MCS' employees were misled by the status of MDMH at the time of the elections, even though MCS had every opportunity to present such evidence during these proceedings. At the time that MERC conducted the elections, it was the case that MDMH was considered to be a joint employer. However, as Intervenor AFSCME states, "everyone knew, or should have known, that the status of the state as employer under PERA was subject to vigorous litigation." AFSCME Br. at 22. Thus, contrary to MCS' unsupported assertion, there is no indication that the MERC-conducted elections at the time "denied employees a free and fair choice based upon the truth;" nor is there any basis to believe that "the complexity of the interrelationships between the State of Michigan Department of Mental Health, the state judiciary, the MERC, the Board, and the parties to the election robbed employees and

Employers of a clear understanding as to the impact of the union elections." MCS Br. at 18. Because there was no misrepresentation concerning MDMH's status as a joint employer, there is no basis to set aside the elections.

Nevertheless, MCS' real complaint is whether the changed circumstance of MDMH not being at the bargaining table called into question whether the election results reflected the desires of their employees to be represented by the Unions. Thus, MCS claims:

> Had employees known in the present case that the State of Michigan would ultimately not participate in collective bargaining, the result of the election could easily have been different. Without the misrepresentation regarding the state's involvement, employees could have weighed the extraction of union dues out of modest earnings against the improbability of the union securing higher wages or different working conditions.

MCS Br. at 22-23. According to MCS, the elections should be invalidated because "it is doubtful that employees would have voted for a decrease in their wages to finance a union dues deduction, in light of the improbability of wage increases at the bargaining table." MCS Br. at 27.

Here, the Board reasonably rejected as speculative the claim of MCS that the contracts between MCS and MDMH legally preclude MCS and their employees from bargaining about improved wages, benefits, staffing levels and the like. Even though the contracts with MDMH set the wages,

benefits and staffing levels for which MCS will be reimbursed during the contracts' annual term, these contracts do not prevent the employers from agreeing to increase such terms during collective bargaining with their employees. Thus, there is no credible evidence that MCS' employees would have rejected union representation had they known that MDMH would not be present at the bargaining table.

As the Board perceptively points out, the only real change in the employees' situation resulting from the Board's recognition of the MERC-conducted elections held before the issuance of *Management Training* is that MCS' employees are now authorized to strike. As the Board notes, the employees were prohibited from striking against an exempt governmental entity under PERA. However, under the Board's jurisdiction, the employees are permitted to strike, thus strengthening their ability to enforce their bargaining demands. Given that the employees were given authorization to strike, the Board correctly reasons that it is unlikely that the changed circumstance occasioned by the Board's jurisdiction of this matter would cause the employees to abandon union representation. Because it is not very likely that the absence of the MDMH at the bargaining table would have affected employee views and attitudes about union representation, there was no support for nullifying the elections upon the basis of a changed circumstance.

Consequently, MCS cannot repudiate its bargaining obligations. As the Board makes clear, the situation in this case is similar to one in a successorship context in which new owners cannot repudiate an existing bargaining obligation on the ground of changed circumstances. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38, 47, 96 L. Ed.

2d 22, 107 S. Ct. 2225 (1987); *ARMCO, Inc. v. NLRB*, 832 F.2d 357, 362-63 (6th Cir. 1995); *NLRB v. Winco Petroleum Co.*, 668 F.2d 973, 982 (8th Cir. 1982). As stated in *Fall River*, the appropriate inquiry is whether any changes have occurred such that "if [the employees'] legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest." *Fall River*, 482 U.S. at 43-44. Further, as the Board points out, to allow new elections in this case would permit MCS "to exploit the heightened insecurities among employees" to the detriment of the Act's fundamental policy of favoring "industrial peace." In any event, it is well recognized that the employees have the statutorily-protected right of relieving themselves of union representation if they so desire. *See Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790, 135 L. Ed. 2d 64, 116 S. Ct. 1754 (1996)(observing that the union was "subject to a decertification petition from the workers if they want to file one"); *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704-06, 88 L. Ed. 1020, 64 S. Ct. 817 (1944). Thus, if the employees are not well-served by union representation, they can pursue decertification petitions.

Accordingly, we find that the Board did not err in extending comity to the MERC-conducted elections held before the issuance of *Management Training*. We thus deny MCS' petition for review.

Case No. 00-2451:AFSCME's Petition

On the other hand, contrary to AFSCME's claim, the Board did not err in declining to extend comity to the MERC-conducted elections after *Management Training* was decided on the basis that MERC lacked jurisdiction to hold these

elections. In reviewing this claim, we note that the NLRB "has discretion whether to exercise jurisdiction." *Pikeville*, 109 F.3d at 1152 (quoting *Crestline Memorial Hosp. Ass'n, Inc. v. NLRB*, 668 F.2d 243, 244 (6th Cir.1982)). "Thus, absent a showing that [the Board] acted unfairly and caused substantial prejudice to the affected employer, a reviewing court should not disturb the NLRB's discretionary decision concerning assertion of that oversight." *Pikeville*, 109 F.3d at 1152 (internal citations and quotation marks omitted).

In determining whether the Board had jurisdiction, this Court in *Pikeville* set forth the following standard: "Under a *Management Training Corp*. analysis, the jurisdiction of the NLRB over [an employer] is established simply by the minimal showing that the [employer] both "meets the definition of 'employer' under Section 2(2) of the Act," and "meets the applicable monetary jurisdictional standards." *Id.* Under this test, the Board properly had jurisdiction over SLS.

In this regard, there is no merit to AFSCME's claim that SLS waived the jurisdictional issue by failing to raise it before the MERC elections were held or before the Board in *Summer's Living Systems, Inc.* As the Intervenors SLS point out, their failure to contest the jurisdiction of the MERC at the time of the elections does not prevent the Board from concluding that the MERC lacked jurisdiction to conduct the elections after *Management Training*. As this Court noted in *NLRB v. Ferraro's Bakery, Inc.*:

> The Board concedes that the question of its statutory jurisdiction may be raised at any time despite failure to raise this issue before the Board in a timely fashion. Failure to file

> exceptions does not confer jurisdiction on the Board if the order is beyond the scope of its statutory authority. As said in *N.L.R.B. v. Cheney California Lumber Company*, 327 U.S. 385, 388, 66 S. Ct. 533, 554, 90 L. Ed. 739:
>
> "Since the court is ordering entry of a decree, it need not render such a decree if the Board has patently traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce."
>
> It is elementary that:
>
> "Want of jurisdiction of the subject matter cannot be waived; that jurisdiction of the subject matter cannot be supplied by the consent of the parties; and that objection to lack of such jurisdiction may be interposed or noticed at any stage of the action." 1A Barron and Holtzoff, Fed. Practice and Procedure, § 370b (Wright ed., 1960).

353 F.2d 366, 369 (6th Cir. 1965). Thus, the Board was free to exercise its discretion and assume jurisdiction at any time.

In this case, the Board, after issuing *Management Training,* had exclusive jurisdiction to direct or supervise the elections. *See Sears, Roebuck & Co. v. Carpenter's Dist. Council (San Diego)*, 436 U.S. 180, 202, 56 L. Ed. 2d 209, 98 S. Ct. 1745 (1978) ("The primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be

presented to the Board.") As Intervenor SLS rightly argues, quoting from *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959), state jurisdiction is displaced if conduct is "arguably within the compass of § 7 or § 8 of the Act." Given that the elections were "arguably within the compass of § 7 or § 8 of the Act," the elections conducted by MERC should be void. *See Mass. Labor Relations Comm'n v. Blue Hill Spring Water Co.*, 11 Mass. App. Ct. 50, 414 N.E.2d 351 (Mass. Ct. App. 1980) (recognizing that proceedings in the Massachusetts Labor Relations Committee would be void if the Board had asserted jurisdiction of an unfair labor practice complaint).

Because MERC did not have jurisdiction to conduct the elections involving SLS after the issuance of *Management Training*, the Board properly refused to extend comity to these MERC-conducted elections. As pointed out by SLS, extending comity in this case would directly violate the intent of Congress to vest exclusive jurisdiction with the Board and subvert the goal announced in *New York Telephone Co. v. New York State Dept. of Labor*, 440 U.S. 519, 59 L. Ed. 2d 553, 99 S. Ct. 1328 (1979) of promoting a unified nationwide scheme of labor law implemented by a centralized agency. Specifically, the Court in *New York Telephone Co.* stated,

> The overriding interest in a uniform, nationwide interpretation of the federal statute by the centralized expert agency created by Congress not only demands that the NLRB's primary jurisdiction be protected, it also forecloses overlapping state enforcement of the prohibitions in § 8 of the Act [29 U.S.C. §

> 158] . . . as well as state interference with the exercise of rights protected by § 7 of the Act [29 U.S.C. § 157].

Id. at 528 (citations and footnotes omitted). *See also NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 226, 84 L. Ed. 704, 60 S. Ct. 493 (1940) ("The control of the election proceedings, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone.") Further, we note that the extension of comity to the MERC-conducted elections involving SLS would appear to be inconsistent with the Board's own policy. *See Doctor's Osteopathic Hosp.*, 242 N.L.R.B. 447, 449 (1979), *aff'd* 624 F.2d 1089 (3d Cir. 1980) (noting that "it is only where the state agency's procedure is clearly repugnant to the Act that we will refuse comity"). Accordingly, we deny AFSCME's petition for review.

CONCLUSION

For the foregoing reasons, we **DENY** the petitions for review by MCS in Case No. 00-2192 and AFSCME in Case No. 00-2451, and **ENFORCE** the Board's order in Case No. 00-2440 finding that it is supported by substantial evidence on the record.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD

Cases 7-CA-38546(1), 7-CA-38546(2), 7-CA-38546(3), 7-CA-38863, 7-CA-38912, 7-CA-38913, 7-CA-38914, 7-CA-38915, 7-CA-38916, 7-CA-38917, 7-CA-38918, 7-CA-38919, 7-CA-38920, 7-CA-38921, 7-CA-38922, 7-CA-38923, 7-CA-38924, 7-CA-38925, 7-CA-38926, 7-CA-38927, 7-CA-38929, 7-CA-38930, 7-CA-38931, 7-CA-38932, 7-CA-38934, 7-CA-38935, 7-CA-38936, 7-CA-38937, 7-CA-38938, 7-CA-38939, 7-CA-38940, 7-CA-38941, 7-CA-38942, 7-CA-38943, 7-CA-38944, 7-CA-38945, and 7-CA-39323

[Filed September 25, 2000]

Summer's Living Systems, Inc. and American	)
Federation of State, County and Municipal	)
Employees, AFL-CIO, Michigan Community	)
Services, Inc. and American Federation of State,	)
County and Municipal Employees, AFL-CIO,	)
Saginaw Bay Human Services, Inc. and American	)
Federation of State, County and Municipal Employees,	)
AFL-CIO, AHS Community Services, Inc. and	)
American Federation of State, County and	)
Municipal Employees, AFL-CIO, Alternative	)
Services, Inc. and American Federation of State,	)
County and Municipal Employees, AFL-CIO,	)
Bay-Arenac Community Living Facility and	)
American Federation of State, County and	)

Municipal Employees, AFL-CIO, Independent)
Opportunities, Inc. and American Federation of State,)
County and Municipal Employees, AFL-CIO,)
Innovative Housing Development Corp. and)
American Federation of State, County and)
Municipal Employees, AFL-CIO, Jones AFC, Inc.)
and American Federation of State, County and)
Municipal Employees, AFL-CIO, Lafayette)
RCA, Inc. and American Federation of State,)
County and Municipal Employees, AFL-CIO,)
Lewisite, Inc. and American Federation of State,)
County and Municipal Employees, AFL-CIO,)
Blue Water Development Housing, Inc. and)
American Federation of State, County and)
Municipal Employees, AFL-CIO, Char Di John)
Homes, Inc., Carson's AFC, Inc. and American)
Federation of State, County and Municipal Employees,)
AFL-CIO, Cencare Foster Care Home, Inc. and)
American Federation of State, County and)
Municipal Employees, AFL-CIO, Central State)
Community Services, Inc. and American Federation)
of State, County and Municipal Employees,)
AFL-CIO, Community Normalization Home, Inc.)
and American Federation of State, County and)
Municipal Employees, AFL-CIO, Community Spirit)
Homes, Incorporated and American Federation of)
State, County and Municipal Employees, AFL-CIO,)
Domel Incorporated and American Federation)
of State, County and Municipal Employees,)
AFL-CIO, Flushing Association in Transitional)
Housing, Inc. Successor to A.R.C.)
Corporation and American Federation of State,)
County and Municipal Employees, AFL-CIO,)
Fredericks Family Homes A.F.C. Inc. and)
American Federation of State, County and)

Municipal Employees, AFL-CIO, Graves Adult)
Foster Care, Inc. and American Federation of State,)
County and Municipal Employees, AFL-CIO,)
Harrington House, Inc. and American Federation)
of State, County and Municipal Employees,)
AFL-CIO, Horizon Residential Center, Inc. and)
American Federation of State, County and)
Municipal Employees, AFL-CIO, Hunt St. Villa, Inc)
and American Federation of State, County and)
Municipal Employees, AFL-CIO, New Outlook, Inc.)
and American Federation of State, County and)
Municipal Employees, AFL-CIO, Pam's Care)
Home, Inc. & McRoy & Georgia's Care, Inc. and)
American Federation of State, County and)
Municipal Employees, AFL-CIO, Lipkin)
Homes, Inc. and American Federation of State,)
County and Municipal Employees, AFL-CIO,)
Louisiana Homes, Inc. and American Federation)
of State, County and Municipal Employees,)
AFL-CIO, Cedell Murff of Lafayette and)
Forrer and American Federation of State,)
County and Municipal Employees, AFL-CIO,)
New Center II, Inc. and American Federation)
of State, County and Municipal Employees,)
AFL-CIO, Passages Community Services, Inc. and)
American Federation of State, County and)
Municipal Employees, AFL-CIO, Quality Living)
Systems Management Corp., Paragon Non-Profit)
Housing Corp. and American Federation of State,)
County and Municipal Employees, AFL-CIO,)
Ray Roberts Residential Services, Inc. and)
American Federation of State, County and)
Municipal Employees, AFL-CIO, Reach)
Alternative Community Homes, Inc. and)
American Federation of State, County and)

Municipal Employees, AFL-CIO, Transitional Living Systems, Inc. Foster Connole AFC Homes, Inc. and American Federation of State, County and Municipal Employees, AFL-CIO, Adult Learning Systems, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO

DECISION AND ORDER

By John C. Truesdale, Chairman; Sarah M. Fox, Member; Wilma B. Liebman, Member.

OPINION

On January 9, 1998, Administrative Law Judge John H. West issued the attached decision. The Respondents filed exceptions and a supporting brief, the General Counsel filed exceptions and a supporting brief, and Charging Party American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME) filed exceptions which incorporated by reference the General Counsel's exceptions and supporting brief. The General Counsel and Charging Party International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO each filed an answering brief to the Respondents' exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Orders as modified.[2]

As more fully set forth in the judge's decision, the procedural history and pertinent facts of these cases are essentially undisputed. Briefly, all of the Respondents, except Adult Learning Systems, Inc., are engaged in providing personal care and support services to handicapped individuals within the State of Michigan. Respondent Adult Learning Systems, Inc. provides group home services to mentally disabled and mentally ill persons in Michigan. Each of the Respondents operates as a joint employer[3] with the Michigan Department of Mental Health (DMH). In all the cases except

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[1] We have amended the judge's conclusions of law to accurately reflect the unit description for Reach Alternative Community Homes, Inc., and to specify the cases in which the complaints are dismissed. We have also modified the recommended Order accordingly.

[2] We have added a new notice to employees for Respondents Carson's AFC, Inc. (appendix A(29)) which the judge inadvertently omitted, and have modified the notice to employees for Respondent Reach Alternative Community Homes, Inc. (appendix A(28)) to accurately reflect the unit description.

[3] A joint employer relationship exists when otherwise independent businesses share or codetermine matters governing essential terms and conditions of employment of a group of employees. See *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995); *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982), enfg. 259 NLRB 148 (1981).

Case 7-CA-38863. AFSCME has sought to represent employees classified as direct care workers or program aides working for the named Respondents. In Case 7-CA-38863, the UAW has sought to represent a unit of direct care workers employed by Respondent Adult Learning Systems, Inc. Both Unions previously filed individual representation petitions with the Michigan Employment Relations Commission (MERC) seeking separate elections among these employees.[4] The Unions won all these elections and later received certifications of representative issued by MERC. Thereafter, the Unions demanded collective bargaining with the Respondents and their common joint employer DMH. Some of the Respondents agreed to bargain with the Unions, but contingent upon DMH's participation, while other Respondents and DMH have refused to recognize and bargain with the Unions.

On July 28, 1995, the Board issued its seminal decision in *Management Training Corp.*,[5] overruling *Res-Care* and expanding the Board's jurisdiction to include certain private employers who have close ties to exempt government entities. In light of *Management Training Corp.*, the Michigan Court of Appeals determined that MERC's jurisdiction over petitions seeking to represent employees of group home

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[4] The parties stipulated that the Unions filed these petitions with MERC because the Board "had declined jurisdiction pursuant to case law and policy as set forth in *Res-Care, Inc.*, 280 NLRB 670 (1986)" and Region 7 of the Board had relied on *Res-Care* to dismiss representation cases involving similar group home employers with contractual ties to DMH.

[5] 317 NLRB 1355.

providers with contractual ties to DMH was pre-empted by the National Labor Relations Act.[6] In response to the court's decision, the Unions forwarded letters dated either March 18 or July 24, 1996, demanding bargaining with the Respondents alone under the National Labor Relations Act. By letters dated either April 26 or August 8, 1996, the Respondents refused to bargain with the Unions as the collective-bargaining representatives of their employees. Thereafter, the Unions filed the instant unfair labor practice charges that allege violations of Section 8(a)(5) and (1) of the Act.

The judge found that the Board should extend comity only to those state elections involving the Unions and the Respondents that were held before the issuance of *Management Training Corp.*[7] He thus accorded the Unions' certifications of representative from MERC, which were based on the pre-July 28, 1995 elections, the same effect that the Board would give one of its own. We find that the judge correctly applied the Board's comity policy, and we adopt his findings that (1) the state-conducted elections reflect the true desires of the affected employees; (2) there was no showing of election irregularities; and (3) there was no substantial

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[6] See *American Federation of State, County and Municipal Employees v. Department of Mental Health*, 215 Mich.App. 1, 545 N.W.2d 363 (1996).

[7] For the reasons stated by the judge, we dismiss the similar 8(a)(5) allegations pertaining to elections involving the Unions and the Respondents that were held after July 28, 1995, when the State of Michigan no longer had jurisdiction over the Respondents.

deviation from due process requirements.[8] We further find, for the reasons stated by the judge, that the removal of joint employer DMH from the bargaining table is not such an unusual circumstance as to relieve the Respondents from their bargaining obligation. Therefore, we adopt the judge's conclusion that the Respondents' refusal to recognize and bargain with the Unions in 1996 and thereafter violated Section 8(a)(5) and (1) of the Act.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the last paragraph of the judge's Conclusion of Law 4.

"All full-time and regular part-time direct care workers, employed in the following homes operated by Reach Alternative Community Homes, Inc. at: 1) Oak Hill Group Home, 7010 Oak Hill, Clarkston, MI 48348; 2) Bigelow Group Home, 10539 Bigelow, Davisburg, MI 48350; 3) Seven Lakes Group Home, 2332 Grange Hall Road, Fenton, MI 48350; 4) Leidich Group Home, 1087 Leidich, Lake Orion, MI 48362; and 5) Indianwood Home."

2. Add the following new paragraph after the judge's Conclusion of Law 7.

"8. The state-conducted elections which were held after July 28, 1995, are void for want of state jurisdiction at the time those elections were held, and thus the complaints against the following Respondents are dismissed: Summer's Living Systems, Inc., Case 7-CA-38546(1); Graves Adult

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[8] See *Standby One Associates*, 274 NLRB 952 (1985).

Foster Care, Inc., Case 7-CA-38930; Pam's Care Home Inc. & McRoy & Georgia's Care, Inc., Case 7-CA-38936; Lipkin Homes, Inc., Case 7-CA-38937; Cedell Murff of Lafayette and Forrer, Case 7-CA-38939; Transitional Living Systems, Inc., Case 7-CA-38945; Foster Connole AFC Homes, Inc., Case 7-CA-39323; the Ingham County employee unit for Alternative Services, Inc., Case 7-CA-38913; and the Char di John employee unit for Char di John, Inc., Carsons AFC. Inc., Case 7-CA-38921."

ORDER

I. The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Michigan Community Services, Inc.; Saginaw Bay Human Services, Inc.; AHS Community Services, Inc.; Alternative Services, Inc.; Bay-Arenac Community Living Facility; Independent Opportunities, Inc.; Innovative Housing Development Corp.; Jones AFC, Inc.; Lafayette RCA, Inc.; Lewisite, Inc.; Blue Water Development Housing, Inc.; Carson's AFC, Inc.; Cencare Foster Care Home, Inc.; Central State Community Services, Inc.; Community Normalization Home, Inc.; Community Spirit Homes, Incorporated; Domel Incorporated; Flushing Association In Transitional Housing, Inc. Successor to A.R.C. Corporation; Fredericks Family Homes A.F.C. Inc.; Harrington House, Inc.; Horizon Residential Center, Inc.; Hunt St. Villa, Inc.; New Outlook, Inc.; Louisiana Homes, Inc.; New Center II, Inc.; Passages Community Services, Inc.; Quality Living Systems Management Corp., Paragon Non-Profit Housing Corp.; Ray Roberts Residential Services, Inc.; and Reach Alternative Community Homes, Inc., located throughout the State of Michigan, their officers,

agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the attached notice "Appendix A(28)."

2. Add the attached notice "Appendix A(29)."

II. The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Adult Learning Systems, Inc., Newberry, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

III. IT IS FURTHER ORDERED that the complaints against the following Respondents are dismissed: Summer's Living Systems, Inc., Case 7-CA-38546(1); Graves Adult Foster Care, Inc., Case 7-CA-38930; Pam's Care Home Inc. & McRoy & Georgia's Care, Inc., Case 7-CA-38936; Lipkin Homes, Inc., Case 7-CA-38937; Cedell Murff of Lafayette and Forrer, Case 7-CA-38939; Transitional Living Systems, Inc., Case 7-CA-38945; Foster Connole AFC Homes, Inc., Case 7-CA-39323; the Ingham County employee unit for Alternative Services, Inc., Case 7-CA-38913; and the Char di John employee unit for Char di John, Inc., Carsons AFC, Inc., Case 7-CA-38921.

Dated, Washington, D.C. September 25, 2000

John C. Truesdale, Chairman

Sarah M. Fox, Member

Wilma B. Liebman, Member

APPENDIX A(28)

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protections
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and, on request, bargain in good faith with American Federation of State, County and Municipal Employees, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit described below:

> All full-time and regular part-time direct care workers, employed in the following homes operated by Reach Alternative Community Homes, Inc. at: 1) Oak Hill Group Home, 7010 Oak Hill, Clarkston, MI 48348; 2) Bigelow Group Home, 10539 Bigelow,

Davisburg, MI 48350; 3) Seven Lakes Group Home, 2332 Grange Hall Road, Fenton, MI 48350; 4) Leidich Group Home, 1087 Leidich, Lake Orion, MI 48362; and 5) Indianwood Home.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with American Federation of State, County, and Municipal Employees (AFSCME), AFL-CIO and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit described above.

REACH ALTERNATIVE COMMUNITY HOMES, INC.

APPENDIX A(29)

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protections
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and, on request, bargain in good faith with American Federation of State, County and Municipal Employees, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit described below:

> All full-time and regular part-time aides/direct care staff employed by Carson's AFC, Inc.; but excluding administrators, home managers, assistant home managers, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with American Federation of State, County, and Municipal Employees (AFSCME), AFL-CIO and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit described above.

CARSON'S AFC, INC.

ALJ-DECISION

Statement of the Case

JOHN H. WEST, Administrative Law Judge: Upon charges filed on specified dates in May and September 1996, by the American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO, as here pertinent, a Second Order Consolidating Cases, Second Amended Consolidated Complaint and Notice of Hearing issued on November 22, 1996, alleging that the Respondents in the above-entitled proceedings, with two exceptions, violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, (Act) by failing and refusing to recognize and bargain with AFSCME as the exclusive collective bargaining representative of the employees in the respective units. Respondents deny violating the Act.[1]

A hearing was held in Detroit, Michigan on January 29 and 30, 1997. Briefs were to be filed on March 10, 1997. On March 7, 1997, Counsel for General Counsel filed a Motion to (1) reopen the record and consolidate the above-entitled consolidated proceeding with Foster Connole AFC Homes, Inc. Case 7-CA-39323 and Adult Learning Systems, Inc. Case 7-CA-38863 in which complaints had issued,[2] (2)

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[1] Respondents assert a number of affirmative defenses.

[2] The complaint in Foster Connole AFC Homes, Inc.(Foster) Case 7-CA-39323 issued on February 5, 1997, and alleged that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain with AFSCME as the exclusive collective bargaining representative of the involved unit. The charge was filed

submit a stipulated record in Cases 7-CA-39323 and 7-CA-38863, and (3) and extend the due date for filing briefs. The Motion was granted. Stipulations of Facts were filed in Cases 7-CA-39323 and 7-CA-38863 on March 19, 1997. The date for filing briefs was further extended and they were filed on or about May 30, 1997, by Counsel for General Counsel, AFSCME, UAW and Respondents.[3] On September 29, 1997,

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by AFSCME on December 24, 1996. Foster denies violating the Act as alleged and it asserts a number of affirmative defenses. The complaint in Adult Learning Systems, Inc. (Adult) Case 7-CA-38863 issued on November 26, 1996, and alleged that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) as the exclusive collective bargaining representative of the involved unit. The complaint also alleges that Adult is a successor to River's Edge Residential Services, Inc. (River's Edge). The charge was filed by UAW on August 19, 1996. Adult denies being a successor to River's Edge, Adult denies violating the Act as alleged and it asserts a number of affirmative defenses.

[3] Counsel for General Counsel on June 19, 1997, filed a Motion to Strike Exhibit Appended to Respondents' Post-trial Brief and Parts of Respondents' Post-trial Brief which allegedly refer to the attachment. On June 26, 1997, Respondents filed a response. Counsel for General Counsel, citing Section 102,45 of the Board's Rules and Regulations, contends that the decision appended to Respondent's brief was not introduced at the hearing herein and thus is entirely outside the record; that portions of Respondents' brief relies upon and quotes directly from the decision appended to the brief; that Respondents' effort to reference such evidence prejudices the due process rights of the General Counsel and the

Respondents filed a motion to reopen the record,[4] On October 6, 1997, Counsel for General Counsel filed her opposition.[5]

Charging Parties; and that no testimony was adduced at trial to establish that the same conditions, contracts and state regulations discussed therein remain extant. Respondents, in their reply, argue that the attachment in question, a copy of the unpublished opinion from Region 7 of the National Labor Relations Board (Board) in Case 7-CA-18529, *Residential Systems Company*, is cited in the Stipulations of Fact participated in by Counsel for General Counsel and therefore is part of the record; that the probative value of the inclusion of this Decision and Order outweighs any prejudice to the General Counsel, the relevancy of the case being conclusively established; "that the General Counsel cannot [and indeed does not] allege with veracity that its own opinion is unauthenticated"; and that General Counsel has not provided any explanation of how it would be prejudiced. It is noted that the unpublished Decision in question is also cited and described in a Michigan court of appeals decision received herein as Charging Party's Exhibit 4. In the circumstances existing here, the motion will be, and it is hereby, denied. The copy of the Decision and Order in question and those portions of the brief which relate to the Decision and Order in question will, nonetheless, be considered argument.

[4] The pleading is titled "MOTION TO REOPEN THE RECORD FOR THE PURPOSE OF INTRODUCING THE ATTACHED SUPPLEMENTAL BRIEF IN LIGHT OF NEWLY DISCOVERED EVIDENCE CONCERNING THE LIFTING OF THE STAY IN *AFSCME v MENTAL HEALTH DEP'T.*, 545 N.W.2d 363, 215 MICH. APP. 1 (1996)."

[5] Her pleading is titled "BRIEF OF COUNSEL FOR THE GENERAL COUNSEL OPPOSING RESPONDENTS' MOTION TO REOPEN THE RECORD; MOTION OF COUNSEL FOR THE GENERAL COUNSEL TO STRIKE RESPONDENTS'

This matter will be treated below. Upon the entire record in this case, including my observation of the demeanor of the witnesses and consideration of the above-described briefs, I make the following:

Findings of Fact

I. Jurisdiction

Respondents are all Michigan corporations[6] which have offices or places of business in Michigan and they all have been engaged in providing personal care and support services, collectively, to handicapped individuals[7] at or out of their offices and places of business in Michigan. The complaints allege, the Respondents admit, and I find that at all times material herein, Respondents have been employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and AFSCME and UAW have been labor organizations within the meaning of Section 2(5) of the Act.

SUPPLEMENT TO POST-TRIAL BRIEF TO THE ADMINISTRATIVE LAW JUDGE."

[6] It is not specifically alleged that Adult is a Michigan corporation.

[7] With respect to Adult, the individuals are mentally disabled and mentally ill.

II. The Alleged Unfair Labor Practices

A. The Facts

At the outset of the hearing herein the parties entered into the following stipulation, Joint Exhibit 1:

1. AFSCME (hereafter the Charging Party), filed petitions for election of representative of the employees of the [involved] providers as set forth ... [in an attachment which does not include Foster], and on the dates indicated [in the attachment], commencing with Louisiana Homes, filed on January 29, 1988, with the Michigan Employment Relations Commission (hereafter MERC).

2. The Charging Party filed the above-mentioned representation petitions with MERC because heretofore the National Labor Relations Board (NLRB) had declined jurisdiction pursuant to case law and policy, as set forth in *Res-Care, Inc.*, 280 NLRB 670 (1986). Moreover, Region 7 [of the NLRB] had previously dismissed representation cases filed in similar group care homes, i.e. *CK Homes*, Case No. 7-RM-1274 (2/14/86) and *Residential Systems*, Case No. 7-RC-18529 (4/7/88), pursuant to *Res-Care*.

3. The Charging Party filed the above-mentioned representation petitions ... naming the provider and the Michigan Department of Mental Health (hereafter Michigan DMH) as joint Employers.

4. The Charging Party named the respective providers as employer pursuant to the Michigan Labor Mediation Act (LMA), MCL 423.1 *et. seq*.

5. The Charging Party named the Michigan DMH as employer pursuant to the Michigan Public Employment Relations Act (PERA), MCL 423.201 *et. seq.*

6. MERC found the Michigan DMH to be a joint employer, along with the respective provider, in all of the petitions filed.

7. The state of Michigan (hereafter the State) appealed MERC's finding of joint ER status in all of the cases filed with MERC by the Charging Party, beginning with Louisiana Homes.

8. The Michigan State Court of Appeals affirmed the MERC determination of the State of Michigan and the provider, Louisiana Homes, joint Employers. (See Louisiana Homes and Michigan Department of Mental Health [remainder of citation omitted])

9. The State of Michigan petitioned for writ of certiorari with the U.S. Supreme Court in *Louisiana Homes*. Certiorari was denied on January 9, 1995, U.S. Sup. Ct. No. 94-638.

10. On July 28, 1995, the NLRB issued its decision in *Management Training*, 317 NLRB 1355 (1995), overruling *Res-Care*.

11. On January 12, 1996, the Michigan Court of Appeals issued its decision in Quality Living Systems, Michigan Court of Appeals No. 158997, vacating MERC decisions in 10 consolidated cases, determining that state

jurisdiction was pre-empted pursuant to *Management Training*.

Then the following stipulation was entered into by AFSCME and Respondents, except Foster and Adult, Charging Party's Exhibit 1:

> 1. That the initial group homes petitions, one filed in 1986 by AFSCME, the other in 1988 by the *UAW, CK Homes*, NLRB No. 7-RM-1275, and *Residential Systems*, NLRB No. 18529 were dismissed by the Board, citing *Res-Care, Inc.*, 280 NLRB 670 (1980), among other cases, on grounds that the providers were tantamount to an administrative arm of the state and that effectual bargaining could not take place between the providers and the Union.
>
> 2. That thereafter AFSCME filed numerous petitions with the Michigan Employment Relations Commission (MERC), including petitions involving all the providers noted herein, naming the state of Michigan Department of Mental Health (MI DMH) and the individual providers as joint employers, and that MERC asserted jurisdiction over the state under the Michigan Public Employment Relations Act, MCL 423.201, *et. seq.* and over the providers under the Michigan Labor Mediation Act, MCL 423.1, *et. seq.*
>
> 3. The lead case, *Louisiana Homes*, in which the petition was filed on January 29,

1988, was finally resolved on January 9, 1995, after appeals by the state on its joint employer status and on the issue of National Labor Relations Act pre-emption.

....

4. That the holdings in Louisiana Homes were relied upon by MERC and the state appellate courts on numerous occasions on the MI DMH's objections and appeals, the MERC eventually ordering directed elections through grants of AFSCME's motions for orders to show cause, and the Michigan Court of Appeals eventually ordering summary affirmances of MERC's decisions on AFSCME's motions pursuant to an administrative order issued by the state Supreme Court requiring stare decisis in like cases. Throughout, the providers took the position with AFSCME that the MI DMH was a joint employer.

5. That after the Board issued its decision in *Management Training Corp.*, 317 NLRB 1355, the state cited that case to both MERC and the state Court of Appeals, arguing that the rationale for the holding in Louisiana Homes had been reversed. The Court of Appeals agreed in *Quality Living Systems*, Mich App (1996). Since the issuance of Quality Living Systems, MERC has stayed further proceedings contingent upon the action of the NLRB on AFSCME's promised petition

or unfair labor practice charges; that Court of Appeals has continued to process representation cases still pending upon the issuance of *Quality Living Systems*. In those cases AFSCME has filed or is filing motions to dismiss the state's appeals, on grounds of federal pre-emption and/or mootness, in light of the Board's complaint in the within cases.

6. That over the period from MERC's decision in 1990 through the Supreme Court's denial of the Michigan Department of Mental Health's application for writ of certiorari in 1995 in *Louisiana Homes*, AFSCME repeatedly demanded collective bargaining of the joint employers. The providers, by their counsel, agreed to bargain contingent upon the state's participation at the table as a joint employer; over that period, the MI DMH refused to bargain on the grounds that its status as joint employer were unresolved. No collective bargaining therefore occurred.

7. After issuance of the Supreme Court's order in *Louisiana Homes* in January 1995, AFSCME reiterated its demand to bargain. This time the state agreed, and collective bargaining was convened in the Louisiana Homes unit by the parties, including AFSCME and both joint employers.

8. Also, after the issuance of final appellate orders in other cases (in which the

state Supreme Court denied the Michigan Department of Mental Health's application for leave to appeal from decisions of the Court of Appeals), the state agreed to bargain as joint employer, with the involved provider, in these cases. The state continued to refuse to bargain in units wherein the state Supreme Court had not issued its order denying the state's application for leave to appeal. The providers, in those units, continued to agree to bargain contingent upon the state's participation as joint employer.

9. After issuance of *Management Training*, and *Quality Living Systems*, the state refused to bargain with AFSCME, and all collective bargaining stopped.

Counsel for General Counsel called two witnesses, namely (1) Margaret Paquet, who is an elections supervisor for the Michigan Bureau of Employment Relations (Bureau) which is presently in the Department of Consumer and Industry Services and was in the Department of Labor, and (2) Rodger Webb, who is counsel for AFSCME. Paquet testified that the Bureau adjudicates labor-relations disputes in the State of Michigan primarily among public employers but also among private employers who do not fall under the jurisdiction of the NLRB; that as election supervisor she is responsible for all representation petitions and unit clarification petitions that are filed with the Bureau; that the Bureau's procedure is very similar to that of the NLRB; that the Bureau conducts elections, either by order of the Michigan Employment Relations Commission (Commission

or MERC) or by consent of the parties, and the Bureau issues tabulations of results and certifications either of representative or results[8]; that elections are normally held on the Employer's premises and the employees in the bargaining unit are informed of an election by the posting of notices for five days on the Employer's premises prior to the election; that the elections are secret ballot elections; that AFSCME filed representation petitions and some unit clarification petitions in numerous adult foster homes for the Respondents involved here; that she handled most if not all of these cases for the Commission; that most of these elections were held subsequent to an order of the Commission[9] and most were held by mail ballot elections due to the nature of the employee complement, the hours they work and the different locations; that with the mail ballots the employees receive a notice of the election; that the mail ballots are sent to the home addresses of the involved employees which addresses are provided by the employers[10]; that the procedures in General Counsel's Exhibit 3 were followed in the elections involving employees of the Respondents; that General Counsel's Exhibit 5 are the tabulations of the results of the elections conducted by the

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[8] General Counsel's Exhibit 2 is a copy of the Act the Commission administers and its rules and regulations. The election procedures are set forth at page 36 of General Counsel's Exhibit 2.

[9] It appears that some of the elections were held by consent of the parties.

[10] The Mail Ballot Election Procedures and the Mail Ballot Instructions were received as General Counsel's Exhibits 3 and 4, respectively. The latter are sent to voters along with the mail ballots.

Bureau[11]; that under Rule 49 of the Commission's Rules a party can file an objection to an election within five working days after the results are made known; that to her knowledge, no objections were filed to any of the involved elections; that for the most part MERC procedures track or follow the National Labor Relations Board's procedures under the National Labor Relations Act; that there is a provision under MERC's rules for the filing of a decertification petition by either an employer or employees but she was not aware of any being filed regarding any of the involved units; that Charging Party's Exhibit 2 are copies of the certifications of representative issued by MERC with respect to the tabulations included in General Counsel's Exhibit 5[12]; that Charging Party's Exhibit 4 is the decision of the Michigan Court of Appeals in *Quality Living Systems* (Quality)[13]; that as a result

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[11] General Counsel's Exhibits 5(i), 5(k) and 5(ff) are the Bureau's alternative records (master cards which contain information recorded from the tabulation) of the election results since these tabulations were not retrieved from the archives. The Michigan Department of Mental Health is named with the Respondents on each of the involved tabulations and the copies of the three master cards. General Counsel's Exhibits 8, 9, 10, 11, 12 and 13 cover the addition of the Wayne and Ingham County units of Respondent Alternative Services, Inc. to its Genesee unit.

[12] Along with the pertinent Respondent, the certifications also name the State of Michigan Department of Mental Health in the unit descriptions.

[13] AFSCME argues that *Quality* does not vacate MERC's certifications. Counsel for General Counsel contends that *Quality* is irrelevant in that at that time the State Court no longer had jurisdiction over the involved employees and Counsel for General

of the court's decision in *Quality* MERC stayed any action before it[14]; and that by Order dated March 14, 1996, the Michigan Court of Appeals granted a motion for stay in *Quality*[15]. On cross-examination Paquet testified that the notice of election sent to the involved voters would identify as employers both the State of Michigan Department of Mental Health and the involved private employer.

Webb testified that by letter dated March 18, 1996, General Counsel's Exhibit 6, to Counsel for Respondents, he, Webb, demanded to bargain with the providers standing alone under the National Labor Relations Act; and that Counsel for Respondents replied by letter dated April 26, 1996, General Counsel's Exhibit 7. It is noted that the reply letter indicates that the demand is incomplete given Webb's failure to include the State of Michigan in the request. On cross-examination Webb testified that AFSCME has taken the position that the State of Michigan was a joint employer and collective bargaining could not proceed without its participation; that while the Michigan Department of Mental Health was a joint employer, the Department of Mental Health has no capacity itself to legislate money and legislated money comes from the State legislature;and that, therefore, whether the Michigan Department of Mental Health is at the bargaining table, it would take the action of the legislature to provide more money. On redirect, Webb testified that the Michigan court of Appeals in *Quality* vacated the MERC decisions on the

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Counsel is relying on the elections establishing majority status.

[14] Charging Party's Exhibit 5.

[15] Charging Party's Exhibit 6.

grounds of pre-emption; that it is AFSCME's position that the vacation applies to the rationale and not to the certification because the State of Michigan appealed from the decision and direction of election not from the certification; that Counsel for Respondents indicated to him that providers would not bargain with AFSCME independent of the State; that the State cannot be compelled to the table any longer before MERC because the State of Michigan has amended PARA to exclude any employee of any contract agency with a State department as an employee for purposes of PARA, General Counsel's Exhibit 14[16]; and that, in essence, the State overruled the joint employer possibility. On recross Webb testified that he forwarded Respondent's Exhibit 1, his April 23, 1996, letter to the Director of the Bureau. In the letter Webb advised the Bureau, as here pertinent, as follows:

> AFSCME has determined that the best, and only certain, way to present the issue to the Board is under the auspices of a standard 'contested case.' To that end, AFSCME has demanded bargaining of the providers as sole employers; on information and belief, that demand will be rejected by the providers, in

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[16] The language reads as follows: "Beginning on the effective date of the amendatory act that adds this sentence, a person employed by a private organization or entity that provides services under a time-limited contract with the state or a political subdivision of the state is not an employee of the state or that subdivision, and is not a public employee." Referring to General Counsel's Exhibit 15, the parties stipulated that the legislation, which passed both houses and was signed by the Governor of Michigan, would take effect in mid to late March 1997.

> part at least on grounds that the State of Michigan is joint employer and the providers ought not to be required to bargain alone. Irrespective of the grounds cited, if the providers decline to bargain, AFSCME will file an unfair labor practice charge with the Board under the NLRA alleging violations of ... [Sections] 8(a)(1) and (5) of the Act. That will squarely pose the issue before the Board: whether it will assert jurisdiction over the providers standing alone. The Board's decision in that regard will be dispositive. We expect to file the charge by the end of next week.

Respondents did not call any witnesses.

As noted above, this proceeding was reopened to receive stipulations of facts in Foster and Adult.[17] The Stipulation of Facts in Foster reads as follows:

> 1. The parties herein stipulate to incorporate the record and all exhibits in Summer's Living, Inc., et. al., Case No. 7-CA-38546, et. al., made before Administrative Law Judge John West on January 29 and 30, 1997, as the record in this case with the addition of the stipulations set forth below.

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[17] For ease of reference the Stipulation of Facts in Foster will be received as Joint Exhibit 2 and the Stipulation of Facts in Adult will be received as Joint Exhibit 3. The parties in Foster and Adult waived a hearing. The reopened record is closed.

2. The parties stipulate that Foster Connole AFC Homes, Inc. (hereafter Respondent F-C) is added to the list of Respondents in Joint Exhibit 1, Attachment A, of the above-described hearing record in Case No. 7-CA-38546, et. al., and that the petition filed by ... AFSCME ... with the ... MERC ... was filed on October 14, 1994, and amended on December 12, 1994. The parties further stipulate that the instant matter is encompassed in ... AFSCME's Exhibit 1 of the above-described hearing record in case No. 7-CA-38546, et. al.

3. The MERC conducted a mail ballot election in a unit of all full-time and regular part-time program aides/direct care workers employed at Respondent F-C's residential care homes, but excluding administrators, home managers, assistant home managers, guards and supervisors as defined by the Act, hereafter the Unit, regarding whether the Unit desires to be represented for the purpose of collective bargaining by ... AFSCME. On September 20, 1995, the MERC counted said ballots and issued a Tabulation of Election Results. .... [The tabulation indicates that there were 8 "YES" votes, 0 "NO" votes and 0 "Challenged Ballots."]

4. On September 20, 1995, by virtue of the MERC's election described above, a majority of the Unit designated and selected

the ... AFSCME as their representative for the purpose of collective bargaining with Respondent F-C.

5. No Objections to the Conduct of the election were filed.

6. On October 2, 1995, the MERC issued a Certification of Representative certifying that a majority of the employees in the Unit selected ... AFSCME as their collective bargaining representative.

7. On March 18, 1996, ... AFSCME sent a letter to Respondent F-C, which letter the NLRB and AFSCME assert constitutes a demand for bargaining.

8. On August 30, 1996, ... AFSCME filed a refusal to bargain unfair labor practice charge with NLRB Region 7, Case No. 7-CA-38928, against Respondent F-C. On October 23, 1996, the Regional Director of Region 7 dismissed Case No. 7-CA-38928 because Respondent F-C claimed it had not received the letter of March 18, 1996, and because Respondent F-C agreed to recognize and bargain with Charging Union AFSCME.

....

9. On October 23, 1996, November 13, 1996 and December 9, 1996, ... AFSCME

sent letters to Respondent F-C, which letters the NLRB and AFSCME assert constitute demands for recognition and bargaining.

....

10. Since October 23, 1996, Respondent F-C has refused to recognize and bargain with ... AFSCME as the collective bargaining representative of the employees in the Unit.

11. No decertification Petition has been filed with the MERC or the NLRB at any time since the above-described MERC election was held and the Tabulation of Results issued.

The Stipulation of Facts in Adult reads as follows:

1. [This paragraph reads the same as stipulation 1. in Foster, as set forth above.]

. . . .

2. ... UAW ... filed a petition for election of representative of certain of the employees of River's Edge Residential Services, Inc., (hereafter River's Edge) on December 14, 1992, with the ... MERC .

3. ... UAW filed the above-mentioned representation petition with the MERC because theretofore the ... NLRB ... had declined

jurisdiction pursuant to case law and policy, as set forth in *Res-Care, Inc.*, 280 NLRB 670 (1986). Moreover, Region 7 of the NLRB had previously dismissed representation cases filed for similar group care homes, i.e., *CK Homes*, Case No. 7-RM-1274 (2/14/86), and *Residential Systems*, Case No. 7-RC-18529 (4/7/88), pursuant to *Res-Care, Inc.*

4. ... UAW filed the above-mentioned representation petition naming River's Edge and the Michigan Department of Mental Health (hereafter Michigan DMH) as joint Employers.

5. ... UAW named River's Edge as employer pursuant to the Michigan Labor Mediation Act (LMA), MCL 423.1, *et. seq.*.

6. ... UAW also named the Michigan DMH as employer pursuant to the Michigan Public Relations Act (PERA), MCL 423.201 *et. seq.*.

7. The MERC found the Michigan DMH and River's Edge to be joint employers in the petition filed.

8. The state of Michigan (hereafter the State) appealed the MERC's finding of Michigan DMH's joint employer status with River's Edge.

9. The MERC conducted a mail ballot election in a unit of certain employees of River's Edge, hereafter the Unit, regarding their desire to select the Charging Union UAW as their representative for the purpose of collective bargaining. On March 25, 1994, the MERC counted said ballots and issued a Tabulation of Election Results. .... [The Tabulation contains a 35 on the "YES" line, a 0 on the "NO" line and a 0 on the "Challenged Ballots" line.]

10. On March 25, 1994, by virtue of the MERC election described above, a majority of the Unit designated and selected the Charging Union UAW as their representative for the purposes of collective bargaining with their employer.

11. On April 4, 1994, the MERC issued a Certification of Representative certifying that a majority of the employees in the Unit selected the Charging Union UAW as their collective bargaining representative.

12. On February 3, 1995, Adult Learning Systems, Inc. (hereafter Respondent ALS) won contracts with the Community Mental Health Boards acting on behalf of the Michigan DMH to provide adult foster care at four of the five facilities previously operated by River's Edge. A fifth facility in or near

Sault Ste. Marie, previously operated by River's Edge, was closed.

13. On about March 1, 1995, Respondent ALS took over the management of the facility and the care and supervision of the residents at the facility in Newberry, Michigan, previously operated by River's Edge. On about April 4, 1995, Respondent ALS took over the management of three facilities and the care and supervision of the residents of those facilities in or near Sault Ste. Marie, Michigan. previously operated by River's Edge. Since winning the contracts and taking over the facilities, Respondent ALS has continued to manage the facilities and provide care and service in basically unchanged form with the same residents, employing a majority of the Unit employees and without a hiatus.

14. On April 27, 1995, ... UAW sent a letter to Respondent ALS demanding bargaining.

15. On April 28, 1995, ... UAW sent its Certification of Representative with a cover letter to Respondent ALS Counsel Gregory J. Bator.

16. On May 2, 1995, Respondent ALS Counsel Gregory Bator, on behalf of Respondent AlS, sent a letter to ... UAW

denying any collective bargaining obligation and refusing to meet with the ... UAW.

17. On June 28, 1995, ... UAW filed a refusal to bargain unfair labor practice charge against Respondent ALS and the Michigan DMH, with the MERC.

18. On July 28, 1995, the NLRB issued its decision in *Management Training*, 317 NLRB 1355 (1995), overruling *Res-Care, Inc., supra.*

19. On December 15, 1995, a hearing was held before the MERC administrative Law Judge James P. Kurtz, in the unfair labor practice charge described above in paragraph 17.

20. On January 12, 1996, the Michigan Court of Appeals issued its decision in Quality Living Systems, Michigan Court of Appeals No. 158997, vacating MERC decisions in 10 consolidated cases, including River's Edge Residential Services, Inc., determining that state jurisdiction was preempted pursuant to Management Training.

21. On March 14, 1996, the Michigan Court of Appeals granted the Motions for Stay filed by the charging Union UAW and ... AFSCME ... in the Quality Living cases.

22. On July 24, 1996, ... UAW sent a letter to Respondent ALS counsel Gregory Bator, copying Respondent ALS, demanding bargaining.

23. On August 8, 1996, Respondent ALS Counsel Gregory Bator, on behalf of Respondent ALS, sent a letter to the ... UAW denying any collective bargaining obligations and refusing to meet with the ... UAW.

24. On August 19, 1996, ... UAW filed a refusal to bargain unfair labor practice charge against Respondent ALS with Region 7 of the NLRB, Case No. 7-CA-38863.

25. During the 12 month period preceding the filing of the charge in Case No. 7-CA-38863 on August 19, 1996, Respondent ALS had gross revenues in excess of $ 100,000 and purchased heating fuel and electrical power valued in excess of $ 5,000 from local utility companies within the State of Michigan, which goods were received directly from outside the State of Michigan. Respondent ALS is now, and has been at all material times, an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

26. All full-time and regularly scheduled part-time direct care workers employed at Respondent ALS's residential

> care homes in Newberry, Michigan, and in or near Sault Ste. Marie, Michigan; but excluding office clerical employees, directors, managers, board members, guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

Contentions

On brief, Counsel for General Counsel contends that while the Act gives the majority of employees in a unit the right to choose a bargaining representative, the Act does not specify how the representative is to be selected; that the Board recognizes a union's majority status based on successive collective bargaining agreements, signed authorization cards, petitions signed by employees and informal elections; that here the majority status of AFSCME and UAW has been established through secret ballot elections held under the auspices of the State of Michigan, Bureau of Employment Relations; that the Board has historically extended comity to representation proceedings conducted, and decisions and certifications issued, by state agencies as long as certain requirements are met; that as the Board indicated in *Standby One Associates*, 274 NLRB 952, 953 (1985):

> Our established practice has been, and continues to be, to accord the same effect to the elections and certifications of responsible state government agencies as we attach to our own, provided that the state proceedings reflect the true desires of the affected employees, election irregularities are not

> involved, and there has been no substantial deviation from due process requirements[;]

that in each bargaining unit involved herein, the MERC conducted secret ballot elections, the parties had the opportunity to witness the count of the ballots and the results of each count were provided to each party, no issues were raise with respect to the appropriate unit at the time, no objections to the election were filed by any party to the election, and at all stages all of the parties were provided full opportunity to present evidence and argument; that the involved employees exercised their right to choose whether to be represented by a labor organization under the most fair and regular of circumstances; that Respondents' argument that without the State at the bargaining table circumstances have radically changed and it would be a violation of due process and the employees' Section 7 rights to require Respondents to recognize and negotiate with the Charging Parties now ignores Board policy that the bargaining obligation of joint employers runs jointly and severally, *Branch International Services, Inc.*, 313 NLRB 1293, 1300 (1994); that in no case did the Respondents file objections to the elections or dispute the certifications of representation; that the employees' designation of a collective bargaining representative in a prior, fair and regular state proceeding should not be negated simply because the Board has reversed itself and now preempts the state; that the Board in *Doctors Osteopathic Hospital*, 242 NLRB 447 (1979) was faced with some similar issues in that there the Employer asserted, among other things, that the Board could not extend comity to the Pennsylvania Labor Relations Board's (PLRB) certification because the Pennsylvania court ruled that the State Board did not have jurisdiction over the Employer, and therefore the

certification was rendered null and void; that the Board determined in *Doctors Osteopathic Hospital, supra,* that

> The court did not, however, question the PLRB's jurisdiction over Respondent as of the time of the election and certification. .... [W]e conclude that the PLRB certification is not void for want of jurisdiction at the time of its issuance

That the Michigan State appeals court issued its decision after *Management Training, supra,* issued, and vacated the underlying MERC decisions, based only on the principle of preemption pursuant to *Management Training, supra,* and the appeals court declined to rule on the other issues before it; that no decertification petitions have been filed and Respondents presented no evidence rebutting the Charging Parties' continuing majority status; that Respondent's are now asking that the Board decide what is important to the employees for collective bargaining, exactly the opposite of the Board's expressed determination in *Management Training, supra,* in that it is not for the Board to decide what terms and conditions are essential for collective bargaining; that a clear majority of River's Edge direct care employees selected UAW as their bargaining representative and after Adult was awarded the adult foster care contracts and took over the facilities previously operated by River's Edge, UAW demanded that Adult bargain with UAW; that Adult stipulated that it has continued to manage the facilities and provide care and service in basically unchanged form with the same residents, employing a majority of the Unit employees without a hiatus; that Adult is a successor to River's Edge and thus has an obligation to recognize and

bargain with UAW; that the Charging Parties find themselves before the Board now only because the Board has expanded the coverage of the Act through *Management Training, supra,* reversing *Res-Care, supra;* that it would be a travesty to allow Respondents to continue thwarting their employees' desires for representation after and because the Board has extended the protection of the Act; and that the purpose of the Act is to promote industrial peace and stability, not to sever established collective bargaining relationships.

AFSCME, on brief, incorporates the position of Counsel for General Counsel by reference and AFSCME argues, among other things,[18] that MERC's certifications are entitled to comity; that overall the "YES" votes account for over 86 percent of the votes cast; that no election irregularities are alleged and no objections to any of the elections were ever filed; that no subsequent decertification petition or other challenge to the MERC elections and certifications was ever filed; that the due process entitlements under Michigan law and the Michigan Department of Labor administrative rules are every bit as rigorous and well tended as those pertinent to Board elections and there is no competent record evidence to the contrary; that the providers' arguments to avoid comity or majority status are without merit; and that the certifications are in no way diminished or otherwise affected by the fact that the state is no longer, as a matter of

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[18] AFSCME contends that the collective bargaining engaged in between the parties independently establishes AFSCME's status as bargaining representative and creates an estoppel to any challenge of that status by the providers.

law (by Board decision and by amendment to PERA), eligible as a joint employer.

On brief, UAW contends that under clearly established law, the Board has recognized that River's Edge was under an obligation to continue recognizing the UAW as the collective bargaining representative after the Board had asserted jurisdiction over group homes in the state of Michigan; that the Board should extend comity to the March 25, 1994, election because the procedure followed by the MERC was sufficiently similar to Board procedures; that the MERC election is a valid and binding method for choosing a bargaining representative under Section 9(a) of the Act; that having recognized and bargained with the UAW, River's Edge could not withdraw recognition without objective reasons for doing so; and that as a successor to River's Edge, Adult has a duty to bargain with the UAW.

Respondents, on brief, argue, inter alia, that the material change in circumstances following the elections has destroyed the employers' ability to negotiate wage increases, and union recognition will result in a salary reduction for employees without an offsetting increase in wages; that new elections are the best method to determine the true desires of the employees while Board extension of comity over the State elections is clearly a second best remedy; that Board comity should not be applied when the context in which the elections were held has materially changed; that the material change in the employer complement has so altered the nature and scope of the collective bargaining relationship that the representation elections should be invalidated; that the State of Michigan's departure from the collective bargaining process so materially altered the identity of the employer that recognition of the

elections would violate the Act; that failure to inform employees of the material changes surrounding the elections is unfair; that the election results can be invalidated without inquiring into the subjective minds of employees; that *Management Training, supra,* resolves a jurisdictional issue; that the holding of *Management Training* should not be unnecessarily extended; and that the parties are best suited to select the topics over which they can bargain collectively, and the Board should not interfere by extending comity over the State conducted elections.

Analysis

Before treating the merits, a procedural matter must be resolved. As noted above, Respondents have filed a "MOTION TO REOPEN THE RECORD FOR THE PURPOSE OF INTRODUCING THE ATTACHED SUPPLEMENTAL BRIEF IN LIGHT OF NEWLY DISCOVERED EVIDENCE CONCERNING THE LIFTING OF THE STAY IN *AFSCME v MENTAL HEALTH DEP'T.*, 545 N.W.2d 363, 215 MICH. APP. 1 (1996)." Also as noted above, Counsel for General Counsel has filed a motion to strike Respondents' Supplemental Brief arguing that the document Respondents seek to admit at this late date is immaterial and cumulative and would not require a different result since a copy of the decision is in the record as Charging Party's Exhibit 4 and the decision is referenced in Joint Exhibit 1, Stipulation 11, with Attachment A listing all Respondents involved. Counsel for General Counsel further argues that in the alternative, Respondents' motion should be granted only for the limited purpose of receiving as an exhibit the September 8, 1997, Order to establish that the Michigan Court of Appeals decision in the case in question is now final.

In accord with *Professional Eye Care*, 289 NLRB 738 (1988) Respondents' motion will be granted only to the extent that I will take notice that the decision in question is now final. There is nothing in Respondents' motion that requires reopening the record to receive a Supplemental Brief. Accordingly, to this extent the motion of Counsel for General Counsel will be, and it is hereby, granted.

Are MERC's elections and certifications entitled to comity from the Board? In my opinion, with exceptions described below, comity should be extended by the Board to the MERC elections and certifications. As noted above, Respondents, on brief, argue, inter alia that the Board's extension of comity over State elections is clearly a second best remedy. We are not approaching this issue before us in terms of "good, better and best." Majority status may be established by means other than a Board election. *JMM Operational Services,* 316 NLRB 6 (1995) citing *Mine Workers v. Arkansas Flooring Co.*, 351 U.S. 62 (1956). As the Board pointed out in *Standby One Associates*, 274 NLRB 952 (1985):

> Our policy with regard to extending comity to state proceedings is set forth in *Allegheny General Hospital*, 230 NLRB 954, 955 (1977) enf. denied on other grounds 608 F.2d 965 (3d Cir. 1979), where the Board stated:
>
> > Our established practice has been, and continues to be, to accord the same effect to the election and certifications of responsible state government agencies as we attach to our own

> provided that the state proceedings reflect the true desires of the affected employees, election irregularities are not involved, and there has been no substantial deviation from due process requirements.

No election irregularities are cited and Respondents have not shown that there has been a substantial deviation from due process requirements. What Respondents argue is that there has been a change in circumstances because the State of Michigan would no longer be at the bargaining table. In view of the Board's decision in *Management Training Corp.*, 317 NLRB 1355 (1995) whether or not the State of Michigan is at the bargaining table is not determinative with respect to the Board's jurisdiction. Respondents apparently argue that whether or not the State of Michigan is at the bargaining table may be determinative with respect to whether the involved employees would continue to want to be represented by a union, and it is necessary to hold new elections to make this determination. Except as noted below, no showing has been make that MERC did not have jurisdiction over Respondents at the time of the elections and certifications. As pointed out by the Board in *Doctor's Osteopathic Hospital*, 242 NLRB 447 (1979), such certifications are not void for want of jurisdiction at the time of issuance. That being the case, the certifications, except as noted below, are valid in terms of jurisdiction, as far as the Act is concerned. Respondents are not arguing that the certifications are invalid because of the present subjective intent of the involved voters. Respondents cannot make such an argument for such intent, even if it were relevant in this proceeding, and it is not, is not a matter of record. Viewed from the employees' perspective, I do not

believe that whether or not the State is at the bargaining table, in the circumstances extant here, is likely to affect their views and attitudes with respect to being represented by a union. But my opinion on this point is not determinative. The issue before me is whether to extend comity. No reason has been provided for not extending comity to the extent that it is recommended that it be extended. If employee sentiment has changed, the proper approach would be to file a decertification petition.

As noted above, Counsel for General Counsel quotes, at page 17 of her brief, as follows from *Doctor's Osteopathic Hospital, supra:*

> The court did not, however, question the PLRB's jurisdiction over Respondent as of the time of the election and certification. .... [W]e conclude that the PLRB certification is not void for want of jurisdiction at the time of its issuance.

The language left out of the middle of this quote reads: "Indeed, the parties stipulated to the PLRB's [Pennsylvania Labor Relations Board] jurisdiction at the hearing. Accordingly ...." Counsel for General Counsel on this same page of her brief also contends as follows:

> Although some of the instant facts can be distinguished from those in Doctor's Osteopathic [Hospital], they are distinctions without a difference in the context of Respondents' Quality Living argument. In both cases, at the time the elections were held, the

> state had jurisdiction over the proceedings, and the Board did not.

In *Doctor's Osteopathic Hospital*, the Board's jurisdiction became effective on August 25, 1974, the involved state election was held on June 13, 1973 and the state certification is dated October 18, 1973. Here the Board decided Management Training on July 28, 1995.[19] All of the elections which were held after July 28, 1995, were ordered by the Michigan State agency; none of these were held with the consent of the involved providers. Those ordered elections which were conducted after July 28, 1995, were held by the Michigan State agency when it did not have jurisdiction. Accordingly, the units involved in those elections which were held by the State after July 28, 1995, will not be included in those to which I recommend that comity be extended. The certifications for the state elections held after July 28, 1995, are void for want of jurisdiction at the time of their issuance.

Adult is the successor to River's Edge. As pointed out by the Court in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), an employer which continues essentially the same business as a prior employer and which hires a majority of its employees from those who had been employed by the prior employer is a successor to the prior employer and is required

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[19] It is noted that AFSCME, on brief, points out that a motion for reconsideration in that proceeding was denied on December 18, 1995. Normally under the Board's Rules and Regulations the filing and pendency of a motion for reconsideration] does not operate to stay the effectiveness of the action of the Board unless so ordered. It has not been demonstrated that it was so ordered. Consequently, the operative date is July 28, 1995.

by law to bargain with the union which was selected by the employees of the predecessor. In determining whether an employer is a successor the following factors are considered: (1) whether there has been a substantial continuity of the same business operations, (2) whether the new employer used the same plant, (3) whether the new employer has the same or substantially the same work force, (4) whether the same jobs exist under the same working conditions. (5) whether the employer employs the same supervisors, (6) whether the employer uses the same machinery, equipment and methods of production, and (7) whether the employer manufactures the same product or offers the same services. As noted above, the parties entered into the following stipulation:

> 13. On about March 1, 1995, Respondent ALS [Adult] took over the management of the facility and the care and supervision of the residents at the facility in Newberry, Michigan, previously operated by River's Edge. On about April 4, 1995, Respondent ALS took over the management of three facilities and the care and supervision of the residents of those facilities in or near Sault Ste. Marie, Michigan previously operated by River's Edge. Since winning the contracts and taking over the facilities, Respondent ALS has continued to manage the facilities and provide care and service in basically unchanged form with the same residents, employing a majority of the Unit employees and without a hiatus.

Adult is the successor to River's Edge and, therefore, it has an obligation to recognize and bargain with UAW.

The evidence of record demonstrates that all of the Respondents, except Adult, were requested by AFSCME in writing to recognize it as the exclusive collective bargaining representative of the respective units. The evidence of record also demonstrates that Adult was requested by UAW in writing to recognize it as the exclusive collective bargaining representative of the employees in the involved unit. As alleged in the complaint, all of the remaining Respondents, except Adult, unlawfully refused to recognize and bargain with AFSCME, and Adult unlawfully refused to recognize and bargain with UAW.

Conclusions of Law

1. Respondents are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. American Federation of State, County and Municipal Employees, (AFSCME) AFL-CIO, and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America are labor organizations within the meaning of Section 2(5) of the Act.

3. Adult Learning Systems, Inc. is the successor of River's Edge Residential Services, Inc..

4. American Federation of State, County and Municipal Employees, (AFSCME) AFL-CIO, has been, and is, the exclusive representative of all employees in the following appropriate units for the purpose of collective bargaining within the meaning of Section 9(a) and Section 9(b) of the Act:

All full-time and regular part-time program aides/direct care workers, including emergency relief employees employed in the following homes operated by Michigan Community Services, Inc.: 1) Berneda, 5142 Berneda Drive, Flint, MI 48506; 2) Park Street, 1125 Park Street, Lapeer, MI 48446; 3) River Road, 6290 River Road, Flushing, MI 48443; 4) Westview, 6260 Westview, Grand Blanc, MI 48439; 5) Day Program I, Wolcott-Cornerston, 3131 Vasser Road, Davison, MI 48243; 6) Granada, 7088 Granada Lane, Flint, MI 48532; 7) Neff Road, 7085 Neff Road, Mt. Morris, MI 48458; 8) Weston, 4181 Weston Drive, Burton, MI 48509; 9) Day Program II, St. Agnes-Cornerston, 530 W. Pierson Road, Flint, MI 48505; and 10) Briarwood, 8620 Joey Drive, Pickney, MI 48169; but excluding guards and supervisors as defined in the Act.

All full-time and regularly scheduled part-time direct care workers employed at the following homes operated by Saginaw Bay Human Services, Inc.: 1) Airport Drive AIS, 13768 Airport Road, Lansing, MI 48906; 2) Foco AIS, 3377 Foco Rd., Standish, MI 48658; 3) Garfield AIS, 2976 N. Garfield, Pinconning, MI 48650; 4) Newberg AIS, 490 W. Newberg, Pinconning, MI 48650; 5) Pine AIS, 2956 Pine River Rd., Standish, MI 48658; 6) River AIS, 2522 Pine River Rd. Standish, MI 48658; 7) Schavey Road AIS, 1009 Schavey

Rd., DeWitt, MI 48820; 8) Spring Street AIS, 1401 N. Spring St., Gladwin, MI 48624; 9) Townline AIS, 1748 E. Townline, Pinconning, MI 48650; 10) Webb Road AIS, 303 W. Webb Rd., DeWitt, MI 48820; 11) Kasemeyer, 5181 Kasemeyer , Bay City, MI 48706; 12) Josephus Residential Treatment Center, 1003 Street, Bay City, MI 48708; and 13) Webb Drive, 700 Webb Drive, Bay City, MI 48706; but excluding guards and supervisors as defined in the Act.

All full-time and regular part-time employees employed by AHS Community Services, Inc. in residential and supportive independence programs in Wayne and Oakland Counties; but excluding supervisors, managers, assistant managers, directors, guards as defined in the Act

All full-time and part-time direct care workers/program aides employed by Alternative Services, Inc. in Genesee and Wayne Counties; but excluding managers, administrators, guards and supervisors as defined in the Act.

All full-time and regular part-time direct care workers, including the Per Diem employees at the Litchfield Home, employed by Bay-Arenac Community Living Facility; but excluding administrators, managers, guards and all supervisors as defined in the Act.

All full-time and part-time direct care workers, including emergency relief employees, employed by Independent Opportunities, Inc.; but excluding all temporary/pool aides, all home managers, assistant home managers, administrators, guards, and supervisors as defined in the Act.

All full-time and part-time direct care workers, including emergency relief employees employed in St. Clair County by Innovative Housing Development Corp.; but excluding all temporary/pool aides, administrators, home managers, assistant home managers, guards and supervisors as defined in the Act.

All full-time and regular part-time program aides/direct care staff employed by Jones AFC, Inc.; but excluding administrators, home managers, assistant home managers, guards and supervisors as defined in the Act.

All full-time and regular part-time employees employed by Lafayette RCA, Inc.; but excluding administrators, directors, managers, assistant managers, guards and supervisors as defined in the Act.

All full-time and regular part-time program aides/direct care workers employed by Lewisite, Inc.; but excluding administrators, home managers, assistant home managers, guards and supervisors as defined in the Act.

All full-time and regular part-time residential technicians/direct careworkers employed by Blue Water Developmental Housing, Inc.; but excluding home managers, assistant home managers, directors, guards and supervisors as defined in the Act.

All full-time and regular part-time program aides/direct care staff employed by Carson's AFC, Inc.; but excluding administrators, home managers, assistant home managers, guards and supervisors as defined in the Act.

All full-time and regular part-time employees in the classes of senior direct care workers and direct care workers employed by Cencare Foster Care Home, Inc.; but excluding administrative employees, confidential employees, guards and supervisors as defined in the Act.

All full-time and regular part-time direct care workers, including emergency relief workers employed in all of the homes of Central State Community Services, Inc., but excluding temporary/pool aides, administrators, home managers, assistant home managers, guards and supervisors as defined in the Act.

All full-time and regular part-time "direct hire" program assistants, program assistants, program assistant/shift leaders and program assistant/midnight shift leaders employed by

Community Normalization Home, Inc.; but excluding appointed officials, executives, guards and supervisors as defined in the Act.

All full-time and regular part-time employees employed by Community Spirit Homes, Incorporated; but excluding managers, assistant managers, directors, administrators, guards and supervisors as defined in the Act.

All full-time and regular part-time non-supervisory employees employed by Domel Incorporated; but excluding managers, assistant managers, directors, guards and supervisors as defined in the Act.

All full-time and regular part-time program aides/direct care workers employed by Flushing Association In Transitional Housing, Inc. Successor to A.R.C. Corporation; but excluding administrators, home managers, assistant home managers, guards and supervisors as defined in the Act.

All full-time and regular part-time direct care staff employed by Fredericks Family Homes A.F.C. Inc. within the County of Wayne, Michigan; but excluding home managers, assistant home managers, administrators, directors, guards and supervisors as defined in the Act.

All full-time and regular part-time program aides/direct care workers employed by Harrington House, Inc.; but excluding administrators, home managers, assistant home managers, guards and supervisors as defined in the Act.

All Full-time and part-time direct care workers employed by Horizon Residential Center, Inc. at its facilities located at 1) Omo Group Home, 56575 Omo, New Haven, MI 48043; (2) Elmwood Group Home, 50084 Sass Road, New Baltimore, MI 48047; (3) Fisher Group Home, 71865 Fisher, Romeo, MI 48065; but excluding guards and supervisors as defined in the Act.

All full-time and regular part-time employees employed by Hunt St. Villa, Inc.; but excluding managers, assistant managers, directors, administrators, guards and supervisors as defined in the Act.

All Full-time and regular part-time employees employed by New Outlook, Inc. in residential and supportive independence programs in the Counties and Wayne and Oakland, MI; but excluding managers, assistant managers, directors, guards and supervisors as defined in the Act.

All full-time and regularly schedules part-time direct care workers employed by Louisiana

Homes, Inc. at 1) 9601 St. Mary's, Detroit, MI 48226; 2) 614 Golden Gate, Detroit, MI; and 3) 3055 Hanley, Hamtramck, MI 49212; but excluding administrators, department heads, guards and supervisors as defined in the Act.

All full-time and regular part-time employees employed by New Center II, Inc.; but excluding administrators, directors, managers, assistant managers, guards and supervisors as defined in the Act.

All full-time and regular part-time direct care workers employed by Passages Community Services, Inc.; but excluding administrators, home managers, assistant home managers, guards and supervisors as defined in the Act.

All full-time and regular part-time program aides/direct care workers employed by Quality Living Systems Management Corp., Paragon Non-Profit Housing Corp.; but excluding administrators, home managers, assistant home managers; guards and supervisors as defined in the Act.

All full-time and regular part-time employees employed by Ray Roberts Residential Services, Inc.; but excluding managers, assistant managers, directors, guards and supervisors as defined in the Act.

> All full-time and regular part-time direct care workers, employed in the following homes operated by Reach Alternative Community Homes, Inc. and the State Department of Mental Health at: 1) Oak Hill Group Home 7010 Oak Hill, Clarkston, MI 48348; 2) Bigelow Group Home, 10539 Bigelow, Davisburg, MI 48350; 3) Seven Lakes Group Home, 2332 Grange Hall Road, Fenton, MI 48430; 4) Leidich Group Home, 1087 Leidich, Lake Orion, MI 48362, and (5) Indianwood Home.

5. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America has been, and is, the exclusive representative of all employees in the following appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) and 9(b) of the Act:

> All full-time and regularly scheduled part-time direct care workers employed at Adult Learning Systems, Inc.'s residential care homes in Newberry, Michigan, and in or near Sault Ste. Marie, Michigan; but excluding office clerical employees, directors, managers, board members, guards and supervisors as defined in the Act.

6. By refusing to recognize and bargain collectively with the above-named labor organizations as the exclusive representative of all of its employees in the appropriate unit, the Respondents have engaged in, and they are engaging in,

unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondents have engaged in certain unfair labor practices, I shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I shall order all remaining Respondents, except Adult Learning Systems, Inc., to bargain with American Federation of State, County and Municipal Employees, (AFSCME) AFL-CIO as the exclusive representative of all their employees in the appropriate units which units are described above.

I shall order Adult Learning Systems, Inc., to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America as the exclusive representative of all their employees in the appropriate unit which is described above.

I shall also order that the Respondents post notice to employees attached as an appendix for 60 days in order that employees may be apprised of their rights under the Act and Respondents' obligation to remedy their unfair labor practices.

On these findings of fact and conclusion of law and on the entire record, I issue the following two recommended Orders:[20]

ORDER

The Respondents described above in paragraph "4." of the Conclusions of Law, their officers agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith with American Federation of State, County and Municipal Employees, (AFSCME) AFL-CIO as the exclusive bargaining representative of the employees in the bargaining units described above.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, bargain with American Federation of State, County and Municipal Employees, (AFSCME) AFL-

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[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102,48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

CIO as the exclusive representative of the employees in the above-described appropriate units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days after service by the Region post at their above-described facilities copies of that attached notices marked "Appendix A(1-28)."[21] Copies of the notices, on forms provided by the Regional Director for Region 7, after being signed by Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced or covered by any other material. In the event that during the pendency of these proceedings, any of the Respondents have gone out of business or closed the facilities involved in these proceedings, the involved Respondent(s) shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent(s) at any time since April 26, 1996.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

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[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

ORDER

Respondent Adult Learning Systems, Inc. its officers agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America as the exclusive bargaining representative of the employees in the bargaining unit described elsewhere in this decision.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regularly scheduled part-time direct care worker employed at Adult Learning Systems, Inc.'s residential care homes in Newberry, Michigan, and in or near Sault Ste. Marie, Michigan; but excluding office clerical employees, directors, managers, board

members, guards and supervisors as defined in the Act.

(b) Post at their above-described facilities copies of that attached notices marked "Appendix B"[22] Copies of the notices, on forms provided by the Regional Director for Region 7, after being signed by the authorized representative of Adult Learning Systems, Inc., shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 8, 1996.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington D.C., December 31, 1997

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[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL
LABOR RELATIONS BOARD
DIVISION OF JUDGES

[Filed January 9, 1998]

SUMMER'S LIVING SYSTEMS, INC.	)
	)
and Case 7-CA-38546(1)	)
	)
MICHIGAN COMMUNITY SERVICES, INC.	)
	)
and Case 7-CA-38546(2)	)
	)
SAGINAW BAY HUMAN SERVICES, INC.	)
	)
and Case 7-CA-38546(3)	)
	)
AHS COMMUNITY SERVICES, INC.	)
	)
and Case 7-CA-38912	)
	)
ALTERNATIVE SERVICES, INC.	)
	)
and Case 7-CA-38913	)
	)
BAY-ARENAC COMMUNITY LIVING FACILITY	)
	)
and Case 7-CA-38914	)

INDEPENDENT OPPORTUNITIES, INC.	)
and Case 7-CA-38915	)
INNOVATIVE HOUSING DEVELOPMENT CORP.	)
and Case 7-CA-38916	)
JONES AFC, INC.	)
and Case 7-CA-38917	)
LAFAYETTE RCA, INC.	)
and Case 7-CA-38918	)
LEWISITE, INC.	)
and Case 7-CA-38919	)
BLUE WATER DEVELOPMENTAL HOUSING,INC.	)
and Case 7-CA-38920	)
CHAR DI JOHN HOMES, INC., CARSON'S AFC, INC.	)
and Case 7-CA-38921	)
CENCARE FOSTER CARE HOME, INC.	)
and Case 7-CA-38922	)
CENTRAL STATE COMMUNITY SERVICES, INC.	)

and	Case 7-CA-38923	)
COMMUNITY NORMALIZATION HOME, INC.		)
and	Case 7-CA-38924	)
COMMUNITY SPIRIT HOMES, INCORPORATED		)
and	Case 7-CA-38925	)
DOMEL INCORPORATED		)
and	Case 7-CA-38926	)
FLUSHING ASSOCIATION IN TRANSITIONAL HOUSING, INC. SUCCESSOR TO A.R.C. CORPORATION		)
and	Case 7-CA-38927	)
FREDERICKS FAMILY HOMES A.F.C., INC.		)
and	Case 7-CA-38929	)
GRAVES ADULT FOSTER CARE, INC.		)
and	Case 7-CA-38930	)
HARRINGTON HOUSE, INC.		)
and	Case 7-CA-38931	)
HORIZON RESIDENTIAL CENTER, INC.		)

and	Case 7-CA-38932	)
		)
HUNT ST. VILLA, INC.		)
		)
and	Case 7-CA-38934	)
		)
NEW OUTLOOK, INC.		)
		)
and	Case 7-CA-38935	)
		)
PAM'S CARE HOME, INC. & MCROY & GEORGIA'S CARE, INC.		)
		)
and	Case 7-CA-38936	)
		)
LIPKIN HOMES, INC.		)
		)
and	Case 7-CA-38937	)
		)
LOUISIANA HOMES, INC.		)
		)
and	Case 7-CA-38938	)
		)
CEDELL MURFF OF LAFAYETTE AND FORRER		)
		)
and	Case 7-CA-38939	)
		)
NEW CENTER II, INC. and PASSAGES COMMUNITY SERVICES, INC.		)
		)
and	Case 7-CA-38940	)
		)
PASSAGES COMMUNITY SERVICES, INC.		)
		)
and	Case 7-CA-38941	)

QUALITY LIVING SYSTEMS MANAGEMENT CORP., PARAGON NON-PROFIT HOUSING CORP.

and Case 7-CA-38942

RAY ROBERTS RESIDENTIAL SERVICES, INC.

and Case 7-CA-38943

REACH ALTERNATIVE COMMUNITY HOMES, INC.

and Case 7-CA-38944

TRANSITIONAL LIVING SYSTEMS, INC.

and Case 7-CA-38945

FOSTER-CONNOLE AFC HOMES, INC.

and Case 7-CA-39323

AMERICAN FEDERATION OF STATE COUNTY & MUNICIPAL EMPLOYEES, (AFSCME), AFL-CIO

and

ADULT LEARNING SYSTEMS, INC.

and Case 7-CA-38863

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, (UAW), AFL-CIO

DECISION

Statement of the Case

JOHN H. WEST, Administrative Law Judge: Upon charges filed on specified dates in May and September 1996, by the American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO, as here pertinent, a Second Order Consolidating Cases, Second Amended Consolidated Complaint and Notice of Hearing issued on November 22, 1996, alleging that the Respondents in the above-entitled proceedings, with two exceptions, violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, (Act) by failing and refusing to recognize and bargain with AFSCME as the exclusive collective bargaining representative of the employees in the respective units. Respondents deny violating the Act.[1]

A hearing was held in Detroit, Michigan on January 29 and 30, 1997. Briefs were to be filed on March 10, 1997. On March 7, 1997, Counsel for General Counsel filed a Motion to (1) reopen the record and consolidate the above-entitled consolidated proceeding with Foster Connole AFC Homes, Inc. Case 7-CA-39323 and Adult Learning Systems, Inc. Case 7-CA-38863 in which complaints had issued,[2] (2)

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[1] Respondents assert a number of affirmative defenses.

[2] The complaint in Foster Connole AFC Homes, Inc.(Foster) Case 7-CA-39323 issued on February 5, 1997, and alleged that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain with AFSCME as the exclusive collective bargaining representative of the involved unit. The charge was filed

submit a stipulated record in Cases 7-CA-39323 and 7-CA-38863, and (3) and extend the due date for filing briefs. The Motion was granted. Stipulations of Facts were filed in Cases 7-CA-39323 and 7-CA-38863 on March 19, 1997. The date for filing briefs was further extended and they were filed on or about May 30, 1997, by Counsel for General Counsel, AFSCME, UAW and Respondents.[3] On September 29, 1997,

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by AFSCME on December 24, 1996. Foster denies violating the Act as alleged and it asserts a number of affirmative defenses. The complaint in Adult Learning Systems, Inc. (Adult) Case 7-CA-38863 issued on November 26, 1996, and alleged that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) as the exclusive collective bargaining representative of the involved unit. The complaint also alleges that Adult is a successor to River's Edge Residential Services, Inc. (River's Edge). The charge was filed by UAW on August 19, 1996. Adult denies being a successor to River's Edge, Adult denies violating the Act as alleged and it asserts a number of affirmative defenses.

[3] Counsel for General Counsel on June 19, 1997, filed a Motion to Strike Exhibit Appended to Respondents' Post-trial Brief and Parts of Respondents' Post-trial Brief which allegedly refer to the attachment. On June 26, 1997, Respondents filed a response. Counsel for General Counsel, citing Section 102,45 of the Board's Rules and Regulations, contends that the decision appended to Respondent's brief was not introduced at the hearing herein and thus is entirely outside the record; that portions of Respondents' brief relies upon and quotes directly from the decision appended to the brief; that Respondents' effort to reference such evidence prejudices the due process rights of the General Counsel and the Charging Parties; and that no testimony was adduced at trial to establish that the same conditions, contracts and state regulations

Respondents filed a motion to reopen the record,[4] On October 6, 1997, Counsel for General Counsel filed her opposition.[5]

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discussed therein remain extant. Respondents, in their reply, argue that the attachment in question, a copy of the unpublished opinion from Region 7 of the National Labor Relations Board (Board) in Case 7-CA-18529, **Residential Systems Company**, is cited in the Stipulations of Fact participated in by Counsel for General Counsel and therefore is part of the record; that the probative value of the inclusion of this Decision and Order outweighs any prejudice to the General Counsel, the relevancy of the case being conclusively established; "that the General Counsel cannot [and indeed does not] allege with veracity that its own opinion is unauthenticated"; and that General Counsel has not provided any explanation of how it would be prejudiced. It is noted that the unpublished Decision in question is also cited and described in a Michigan court of appeals decision received herein as Charging Party's Exhibit 4. In the circumstances existing here, the motion will be, and it is hereby, denied. The copy of the Decision and Order in question and those portions of the brief which relate to the Decision and Order in question will, nonetheless, be considered argument.

[4] The pleading is titled "MOTION TO REOPEN THE RECORD FOR THE PURPOSE OF INTRODUCING THE ATTACHED SUPPLEMENTAL BRIEF IN LIGHT OF NEWLY DISCOVERED EVIDENCE CONCERNING THE LIFTING OF THE STAY IN AFSCME v MENTAL HEALTH DEP'T., 545 N.W.2d 363, 215 MICH. APP. 1 (1996)."

[5] Her pleading is titled "BRIEF OF COUNSEL FOR THE GENERAL COUNSEL OPPOSING RESPONDENTS' MOTION TO REOPEN THE RECORD; MOTION OF COUNSEL FOR THE GENERAL COUNSEL TO STRIKE RESPONDENTS' SUPPLEMENT TO POST-TRIAL BRIEF TO THE ADMINISTRATIVE LAW JUDGE."

This matter will be treated below. Upon the entire record in this case, including my observation of the demeanor of the witnesses and consideration of the above-described briefs, I make the following:

Findings of Fact

I. Jurisdiction

Respondents are all Michigan corporations[6] which have offices or places of business in Michigan and they all have been engaged in providing personal care and support services, collectively, to handicapped individuals[7] at or out of their offices and places of business in Michigan. The complaints allege, the Respondents admit, and I find that at all times material herein, Respondents have been employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and AFSCME and UAW have been labor organizations within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

The Facts

At the outset of the hearing herein the parties entered into the following stipulation, Joint Exhibit 1:

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[6] It is not specifically alleged that Adult is a Michigan corporation.

[7] With respect to Adult, the individuals are mentally disabled and mentally ill.

1. ... AFSCME ... (hereafter the Charging Party), filed petitions for election of representative of the employees of the [involved] providers as set forth ... [in an attachment which does not include Foster], and on the dates indicated [in the attachment], commencing with Louisiana Homes, filed on January 29, 1988, with the Michigan Employment Relations Commission (hereafter MERC).

2. The Charging Party filed the above-mentioned representation petitions with MERC because heretofore the National Labor Relations Board (NLRB) had declined jurisdiction pursuant to case law and policy, as set forth in *Res-Care, Inc.*, 280 NLRB 670 (1986). Moreover, Region 7 [of the NLRB] had previously dismissed representation cases filed in similar group care homes, i.e. CK Homes, Case No. 7-RM-1274 (2/14/86) and Residential Systems, Case No. 7-RC-18529 (4/7/88), pursuant to Res-Care.

3. The Charging Party filed the above-mentioned representation petitions ... naming the provider and the Michigan Department of Mental Health (hereafter Michigan DMH) as joint Employers.

4. The Charging Party named the respective providers as employer pursuant to the

Michigan Labor Mediation Act (LMA), MCL 423.1 *et. seq.*

5. The Charging Party named the Michigan DMH as employer pursuant to the Michigan Public Employment Relations Act (PERA), MCL 423.201 *et. seq.*

6. MERC found the Michigan DMH to be a joint employer, along with the respective provider, in all of the petitions filed.

7. The state of Michigan (hereafter the State) appealed MERC's finding of joint ER status in all of the cases filed with MERC by the Charging Party, beginning with Louisiana Homes.

8. The Michigan State Court of Appeals affirmed the MERC determination of the State of Michigan and the provider, Louisiana Homes, joint Employers. (See Louisiana Homes and Michigan Department of Mental Health [remainder of citation omitted])

9. The State of Michigan petitioned for writ of certiorari with the U.S. Supreme Court in Louisiana Homes. Certiorari was denied on January 9, 1995, U.S. Sup. Ct. No. 94-638.

10. On July 28, 1995, the NLRB issued its decision in *Management Training*, 317 NLRB 1355 (1995), overruling *Res-Care*.

> 11. On January 12, 1996, the Michigan Court of Appeals issued its decision in *Quality Living Systems*, Michigan Court of Appeals No. 158997, vacating MERC decisions in 10 consolidated cases, determining that state jurisdiction was pre-empted pursuant to *Management Training*. ....

Then the following stipulation was entered into by AFSCME and Respondents, except Foster and Adult, Charging Party's Exhibit 1:

> 1. That the initial group homes petitions, one filed in 1986 by AFSCME, the other in 1988 by the UAW, CK Homes, NLRB No. 7-RM-1275, and Residential Systems, NLRB No. 18529 were dismissed by the Board, citing *Res-Care, Inc.*, 280 NLRB 670 (1980), among other cases, on grounds that the providers were tantamount to an administrative arm of the state and that effectual bargaining could not take place between the providers and the Union.
>
> 2. That thereafter AFSCME filed numerous petitions with the Michigan Employment Relations Commission (MERC), including petitions involving all the providers noted herein, naming the state of Michigan Department of Mental Health (MI DMH) and the individual providers as joint employers, and that MERC asserted jurisdiction over the state under the Michigan Public Employment

Relations Act, MCL 423.201, *et. seq.* and over the providers under the Michigan Labor Mediation Act, MCL 423.1, *et. seq.*

3. The lead case, *Louisiana Homes*, in which the petition was filed on January 29, 1988, was finally resolved on January 9, 1995, after appeals by the state on its joint employer status and on the issue of National Labor Relations Act pre-emption. ....

* * * *

4. That the holdings in *Louisiana Homes* were relied upon by MERC and the state appellate courts on numerous occasions on the MI DMH's objections and appeals, the MERC eventually ordering directed elections through grants of AFSCME's motions for orders to show cause, and the Michigan Court of Appeals eventually ordering summary affirmances of MERC's decisions on AFSCME's motions pursuant to an administrative order issued by the state Supreme Court requiring stare decisis in like cases. Throughout, the providers took the position with AFSCME that the MI DMH was a joint employer.

5. That after the Board issued its decision in *Management Training Corp.*, 317 NLRB 1355, the state cited that case to both MERC and the state Court of Appeals, arguing that the rationale for the holding in *Louisiana*

Homes had been reversed. The Court of Appeals agreed in *Quality Living Systems*, Mich App (1996). Since the issuance of *Quality Living Systems*, MERC has stayed further proceedings contingent upon the action of the NLRB on AFSCME's promised petition or unfair labor practice charges; that Court of Appeals has continued to process representation cases still pending upon the issuance of *Quality Living Systems*. In those cases AFSCME has filed or is filing motions to dismiss the state's appeals, on grounds of federal pre-emption and/or mootness, in light of the Board's complaint in the within cases.

6. That over the period from MERC's decision in 1990 through the Supreme Court's denial of the Michigan Department of Mental Health's application for writ of certiorari in 1995 in *Louisiana Homes*, AFSCME repeatedly demanded collective bargaining of the joint employers. The providers, by their counsel, agreed to bargain contingent upon the state's participation at the table as a joint employer; over that period, the MI DMH refused to bargain on the grounds that its status as joint employer were unresolved. No collective bargaining therefore occurred.

7. After issuance of the Supreme Court's order in *Louisiana Homes* in January 1995, AFSCME reiterated its demand to bargain. This time the state agreed, and

collective bargaining was convened in the Louisiana Homes unit by the parties, including AFSCME and both joint employers.

8. Also, after the issuance of final appellate orders in other cases (in which the state Supreme Court denied the Michigan Department of Mental Health's application for leave to appeal from decisions of the Court of Appeals), the state agreed to bargain as joint employer, with the involved provider, in these cases. The state continued to refuse to bargain in units wherein the state Supreme Court had not issued its order denying the state's application for leave to appeal. The providers, in those units, continued to agree to bargain contingent upon the state's participation as joint employer.

9, After issuance of Management Training, and Quality Living Systems, the state refused to bargain with AFSCME, and all collective bargaining stopped.

Counsel for General Counsel called two witnesses, namely (1) Margaret Paquet, who is an elections supervisor for the Michigan Bureau of Employment Relations (Bureau) which is presently in the Department of Consumer and Industry Services and was in the Department of Labor, and (2) Rodger Webb, who is counsel for AFSCME. Paquet testified that the Bureau adjudicates labor-relations disputes in the State of Michigan primarily among public employers but also among private employers who do not fall under the

jurisdiction of the NLRB; that as election supervisor she is responsible for all representation petitions and unit clarification petitions that are filed with the Bureau; that the Bureau's procedure is very similar to that of the NLRB; that the Bureau conducts elections, either by order of the Michigan Employment Relations Commission (Commission or MERC) or by consent of the parties, and the Bureau issues tabulations of results and certifications either of representative or results[8]; that elections are normally held on the Employer's premises and the employees in the bargaining unit are informed of an election by the posting of notices for five days on the Employer's premises prior to the election; that the elections are secret ballot elections; that AFSCME filed representation petitions and some unit clarification petitions in numerous adult foster homes for the Respondents involved here; that she handled most if not all of these cases for the Commission; that most of these elections were held subsequent to an order of the Commission[9] and most were held by mail ballot elections due to the nature of the employee complement, the hours they work and the different locations; that with the mail ballots the employees receive a notice of the election; that the mail ballots are sent to the home addresses of the involved employees which addresses are provided by

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[8] General Counsel's Exhibit 2 is a copy of the Act the Commission administers and its rules and regulations. The election procedures are set forth at page 36 of General Counsel's Exhibit 2.

[9] It appears that some of the elections were held by consent of the parties.

the employers[10]; that the procedures in General Counsel's Exhibit 3 were followed in the elections involving employees of the Respondents; that General Counsel's Exhibit 5 are the tabulations of the results of the elections conducted by the Bureau[11]; that under Rule 49 of the Commission's Rules a party can file an objection to an election within five working days after the results are made known; that to her knowledge, no objections were filed to any of the involved elections; that for the most part MERC procedures track or follow the National Labor Relations Board's procedures under the National Labor Relations Act; that there is a provision under MERC's rules for the filing of a decertification petition by either an employer or employees but she was not aware of any being filed regarding any of the involved units; that Charging Party's Exhibit 2 are copies of the certifications of representative issued by MERC with respect to the tabulations

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[10] The Mail Ballot Election Procedures and the Mail Ballot Instructions were received as General Counsel's Exhibits 3 and 4, respectively. The latter are sent to voters along with the mail ballots.

[11] General Counsel's Exhibits 5(i), 5(k) and 5(ff) are the Bureau's alternative records (master cards which contain information recorded from the tabulation) of the election results since these tabulations were not retrieved from the archives. The Michigan Department of Mental Health is named with the Respondents on each of the involved tabulations and the copies of the three master cards. General Counsel's Exhibits 8, 9, 10, 11, 12 and 13 cover the addition of the Wayne and Ingham County units of Respondent Alternative Services, Inc. to its Genesee unit.

included in General Counsel's Exhibit 5[12]; that Charging Party's Exhibit 4 is the decision of the Michigan Court of Appeals in *Quality Living Systems* (Quality)[13]; that as a result of the court's decision in Quality MERC stayed any action before it[14]; and that by Order dated March 14, 1996, the Michigan Court of Appeals granted a motion for stay in Quality[15]. On cross-examination Paquet testified that the notice of election sent to the involved voters would identify as employers both the State of Michigan Department of Mental Health and the involved private employer.

Webb testified that by letter dated March 18, 1996, General Counsel's Exhibit 6, to Counsel for Respondents, he, Webb, demanded to bargain with the providers standing alone under the National Labor Relations Act; and that Counsel for Respondents replied by letter dated April 26, 1996, General Counsel's Exhibit 7. It is noted that the reply letter indicates that the demand is incomplete given Webb's failure to include the State of Michigan in the request. On cross-examination Webb testified that AFSCME has taken the position that the

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[12] Along with the pertinent Respondent, the certifications also name the State of Michigan Department of Mental Health in the unit descriptions.

[13] AFSCME argues that *Quality* does not vacate MERC's certifications. Counsel for General Counsel contends that *Quality* is irrelevant in that at that time the State Court no longer had jurisdiction over the involved employees and Counsel for General Counsel is relying on the elections establishing majority status.

[14] Charging Party's Exhibit 5.

[15] Charging Party's Exhibit 6.

State of Michigan was a joint employer and collective bargaining could not proceed without its participation; that while the Michigan Department of Mental Health was a joint employer, the Department of Mental Health has no capacity itself to legislate money and legislated money comes from the State legislature;and that, therefore, whether the Michigan Department of Mental Health is at the bargaining table, it would take the action of the legislature to provide more money. On redirect, Webb testified that the Michigan court of Appeals in *Quality* vacated the MERC decisions on the grounds of pre-emption; that it is AFSCME's position that the vacation applies to the rationale and not to the certification because the State of Michigan appealed from the decision and direction of election not from the certification; that Counsel for Respondents indicated to him that providers would not bargain with AFSCME independent of the State; that the State cannot be compelled to the table any longer before MERC because the State of Michigan has amended PARA to exclude any employee of any contract agency with a State department as an employee for purposes of PARA, General Counsel's Exhibit 14[16]; and that, in essence, the State overruled the joint employer possibility. On recross Webb testified that he forwarded Respondent's Exhibit 1, his April 23, 1996, letter

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[16] The language reads as follows: "Beginning on the effective date of the amendatory act that adds this sentence, a person employed by a private organization or entity that provides services under a time-limited contract with the state or a political subdivision of the state is not an employee of the state or that subdivision, and is not a public employee." Referring to General Counsel's Exhibit 15, the parties stipulated that the legislation, which passed both houses and was signed by the Governor of Michigan, would take effect in mid to late March 1997.

to the Director of the Bureau. In the letter Webb advised the Bureau, as here pertinent, as follows:

> ... AFSCME has determined that the best, and only certain, way to present the issue to the Board is under the auspices of a standard 'contested case.' To that end, AFSCME has demanded bargaining of the providers as sole employers; on information and belief, that demand will be rejected by the providers, in part at least on grounds that the State of Michigan is joint employer and the providers ought not to be required to bargain alone. Irrespective of the grounds cited, if the providers decline to bargain, AFSCME will file an unfair labor practice charge with the Board under the NLRA alleging violations of ... [Sections] 8(a)(1) and (5) of the Act. That will squarely pose the issue before the Board: whether it will assert jurisdiction over the providers standing alone. The Board's decision in that regard will be dispositive. We expect to file the charge by the end of next week.

Respondents did not call any witnesses.

As noted above, this proceeding was reopened to receive stipulations of facts in Foster and Adult.[17] The Stipulation of Facts in Foster reads as follows:

> 1. The parties herein stipulate to incorporate the record and all exhibits in *Summer's Living, Inc.*, et. al., Case No. 7-CA-38546, et. al., made before Administrative Law Judge John West on January 29 and 30, 1997, as the record in this case with the addition of the stipulations set forth below.
>
> 2. The parties stipulate that Foster Connole AFC Homes, Inc. (hereafter Respondent F-C) is added to the list of Respondents in Joint Exhibit 1, Attachment A, of the above-described hearing record in Case No. 7-CA-38546, et. al., and that the petition filed by ... AFSCME ... with the ... MERC ... was filed on October 14, 1994, and amended on December 12, 1994. The parties further stipulate that the instant matter is encompassed in ... AFSCME's Exhibit 1 of the above-described hearing record in case No. 7-CA-38546, et. al.
>
> 3. The MERC conducted a mail ballot election in a unit of all full-time and regular part-time

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[17] For ease of reference the Stipulation of Facts in Foster will be received as Joint Exhibit 2 and the Stipulation of Facts in Adult will be received as Joint Exhibit 3. The parties in Foster and Adult waived a hearing. The reopened record is closed.

program aides/direct care workers employed at Respondent F-C's residential care homes, but excluding administrators, home managers, assistant home managers, guards and supervisors as defined by the Act, hereafter the Unit, regarding whether the Unit desires to be represented for the purpose of collective bargaining by ... AFSCME. On September 20, 1995, the MERC counted said ballots and issued a Tabulation of Election Results. .... [The tabulation indicates that there were 8 "YES" votes, 0 "NO" votes and 0 "Challenged Ballots."]

4. On September 20, 1995, by virtue of the MERC's election described above, a majority of the Unit designated and selected the ... AFSCME as their representative for the purpose of collective bargaining with Respondent F-C.

5. No Objections to the Conduct of the election were filed.

6. On October 2, 1995, the MERC issued a Certification of Representative certifying that a majority of the employees in the Unit selected ... AFSCME as their collective bargaining representative. ....

7. On March 18, 1996, ... AFSCME sent a letter to Respondent F-C, which letter the

NLRB and AFSCME assert constitutes a demand for bargaining. ....

8. On August 30, 1996, ... AFSCME filed a refusal to bargain unfair labor practice charge with NLRB Region 7, Case No. 7-CA-38928, against Respondent F-C. On October 23, 1996, the Regional Director of Region 7 dismissed Case No. 7-CA-38928 because Respondent F-C claimed it had not received the letter of March 18, 1996, and because Respondent F-C agreed to recognize and bargain with Charging Union AFSCME. ....

9. On October 23, 1996, November 13, 1996 and December 9, 1996, ... AFSCME sent letters to Respondent F-C, which letters the NLRB and AFSCME assert constitute demands for recognition and bargaining. ....

10. Since October 23, 1996, Respondent F-C has refused to recognize and bargain with ... AFSCME as the collective bargaining representative of the employees in the Unit.

11. No decertification Petition has been filed with the MERC or the NLRB at any time since the above-described MERC election was held and the Tabulation of Results issued.

The Stipulation of Facts in Adult reads as follows:

1. [This paragraph reads the same as stipulation 1. in Foster, as set forth above.]

* * * * *

2. ... UAW ... filed a petition for election of representative of certain of the employees of River's Edge Residential Services, Inc., (hereafter River's Edge) on December 14, 1992, with the ... MERC ....

3. ... UAW filed the above-mentioned representation petition with the MERC because theretofore the ... NLRB ... had declined jurisdiction pursuant to case law and policy, as set forth in *Res-Care, Inc.*, 280 NLRB 670 (1986). Moreover, Region 7 of the NLRB had previously dismissed representation cases filed for similar group care homes, i.e., *CK Homes*, Case No. 7-RM-1274 (2/14/86), and *Residential Systems*, Case No. 7-RC-18529 (4/7/88), pursuant to *Res-Care, Inc.*

4. ... UAW filed the above-mentioned representation petition naming River's Edge and the Michigan Department of Mental Health (hereafter Michigan DMH) as joint Employers.

5. ... UAW named River's Edge as employer pursuant to the Michigan Labor Mediation Act (LMA), MCL 423.1, **et. seq.**.

6. ... UAW also named the Michigan DMH as employer pursuant to the Michigan Public Relations Act (PERA), MCL 423.201 et. seq..

7. The MERC found the Michigan DMH and River's Edge to be joint employers in the petition filed.

8. The state of Michigan (hereafter the State) appealed the MERC's finding of Michigan DMH's joint employer status with River's Edge.

9. The MERC conducted a mail ballot election in a unit of certain employees of River's Edge, hereafter the Unit, regarding their desire to select the Charging Union UAW as their representative for the purpose of collective bargaining. On March 25, 1994, the MERC counted said ballots and issued a Tabulation of Election Results. .... [The Tabulation contains a 35 on the "YES" line, a 0 on the "NO" line and a 0 on the "Challenged Ballots" line.]

10. On March 25, 1994, by virtue of the MERC election described above, a majority of the Unit designated and selected the Charging Union UAW as their representative for the purposes of collective bargaining with their employer.

11. On April 4, 1994, the MERC issued a Certification of Representative certifying that

a majority of the employees in the Unit selected the Charging Union UAW as their collective bargaining representative. ....

12. On February 3, 1995, Adult Learning Systems, Inc. (hereafter Respondent ALS) won contracts with the Community Mental Health Boards acting on behalf of the Michigan DMH to provide adult foster care at four of the five facilities previously operated by River's Edge. A fifth facility in or near Sault Ste. Marie, previously operated by River's Edge, was closed.

13. On about March 1, 1995, Respondent ALS took over the management of the facility and the care and supervision of the residents at the facility in Newberry, Michigan, previously operated by River's Edge. On about April 4, 1995, Respondent ALS took over the management of three facilities and the care and supervision of the residents of those facilities in or near Sault Ste. Marie, Michigan. previously operated by River's Edge. Since winning the contracts and taking over the facilities, Respondent ALS has continued to manage the facilities and provide care and service in basically unchanged form with the same residents, employing a majority of the Unit employees and without a hiatus,

14. On April 27, 1995, ... UAW sent a letter to Respondent ALS demanding bargaining. ....

15. On April 28, 1995, ... UAW sent its Certification of Representative with a cover letter to Respondent ALS Counsel Gregory J. Bator. ....

16. On May 2, 1995, Respondent ALS Counsel Gregory Bator, on behalf of Respondent AlS, sent a letter to ... UAW denying any collective bargaining obligation and refusing to meet with the ... UAW. ....

17. On June 28, 1995, ... UAW filed a refusal to bargain unfair labor practice charge against Respondent ALS and the Michigan DMH, with the MERC. ....

18. On July 28, 1995, the NLRB issued its decision in *Management Training*, 317 NLRB 1355 (1995), overruling *Res-Care, Inc., supra.*

19. On December 15, 1995, a hearing was held before the MERC administrative Law Judge James P. Kurtz, in the unfair labor practice charge described above in paragraph 17. ....

20. On January 12, 1996, the Michigan Court of Appeals issued its decision in *Quality Living Systems*, Michigan Court of Appeals No. 158997, vacating MERC decisions in 10 consolidated cases, including River's Edge Residential Services, Inc., determining that

state jurisdiction was preempted pursuant to *Management Training*,

21. On March 14, 1996, the Michigan Court of Appeals granted the Motions for Stay filed by the charging Union UAW and ... AFSCME ... in the *Quality Living* cases.

22. On July 24, 1996, ... UAW sent a letter to Respondent ALS counsel Gregory Bator, copying Respondent ALS, demanding bargaining. ....

23. On August 8, 1996, Respondent ALS Counsel Gregory Bator, on behalf of Respondent ALS, sent a letter to the ... UAW denying any collective bargaining obligations and refusing to meet with the ... UAW. ....

24. On August 19, 1996, ... UAW filed a refusal to bargain unfair labor practice charge against Respondent ALS with Region 7 of the NLRB, Case No. 7-CA-38863.

25. During the 12 month period preceding the filing of the charge in Case No. 7-CA-38863 on August 19, 1996, Respondent ALS had gross revenues in excess of $ 100,000 and purchased heating fuel and electrical power valued in excess of $ 5,000 from local utility companies within the State of Michigan, which goods were received directly from outside the State of Michigan. Respondent ALS is now,

and has been at all material times, an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

26. All full-time and regularly scheduled part-time direct care workers employed at Respondent ALS's residential care homes in Newberry, Michigan, and in or near Sault Ste. Marie, Michigan; but excluding office clerical employees, directors, managers, board members, guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

Contentions

On brief, Counsel for General Counsel contends that while the Act gives the majority of employees in a unit the right to choose a bargaining representative, the Act does not specify how the representative is to be selected; that the Board recognizes a union's majority status based on successive collective bargaining agreements, signed authorization cards, petitions signed by employees and informal elections; that here the majority status of AFSCME and UAW has been established through secret ballot elections held under the auspices of the State of Michigan, Bureau of Employment Relations; that the Board has historically extended comity to representation proceedings conducted, and decisions and certifications issued, by state agencies as long as certain requirements are met; that as the Board indicated in *Standby One Associates*, 274 NLRB 952, 953 (1985):

> our established practice has been, and continues to be, to accord the same effect to the elections and certifications of responsible state government agencies as we attach to our own, provided that the state proceedings reflect the true desires of the affected employees, election irregularities are not involved, and there has been no substantial deviation from due process requirements[;]

that in each bargaining unit involved herein, the MERC conducted secret ballot elections, the parties had the opportunity to witness the count of the ballots and the results of each count were provided to each party, no issues were raise with respect to the appropriate unit at the time, no objections to the election were filed by any party to the election, and at all stages all of the parties were provided full opportunity to present evidence and argument; that the involved employees exercised their right to choose whether to be represented by a labor organization under the most fair and regular of circumstances; that Respondents' argument that without the State at the bargaining table circumstances have radically changed and it would be a violation of due process and the employees' Section 7 rights to require Respondents to recognize and negotiate with the Charging Parties now ignores Board policy that the bargaining obligation of joint employers runs jointly and severally, *Branch International Services, Inc.*, 313 NLRB 1293, 1300 (1994); that in no case did the Respondents file objections to the elections or dispute the certifications of representation; that the employees' designation of a collective bargaining representative in a prior, fair and regular state proceeding should not be negated simply because the Board has reversed itself and now

preempts the state; that the Board in *Doctors Osteopathic Hospital*, 242 NLRB 447 (1979) was faced with some similar issues in that there the Employer asserted, among other things, that the Board could not extend comity to the Pennsylvania Labor Relations Board's (PLRB) certification because the Pennsylvania court ruled that the State Board did not have jurisdiction over the Employer, and therefore the certification was rendered null and void; that the Board determined in *Doctors Osteopathic Hospital, supra,* that

> the court did not, however, question the PLRB's jurisdiction over Respondent as of the time of the election and certification. .... We conclude that the PLRB certification is not void for want of jurisdiction at the time of its issuance[;]

that the Michigan State appeals court issued its decision after *Management Training, supra,* issued, and vacated the underlying MERC decisions, based only on the principle of preemption pursuant to *Management Training, supra,* and the appeals court declined to rule on the other issues before it; that no decertification petitions have been filed and Respondents presented no evidence rebutting the Charging Parties' continuing majority status; that Respondent's are now asking that the Board decide what is important to the employees for collective bargaining, exactly the opposite of the Board's expressed determination in *Management Training, supra,* in that it is not for the Board to decide what terms and conditions are essential for collective bargaining; that a clear majority of River's Edge direct care employees selected UAW as their bargaining representative and after Adult was awarded the adult foster care contracts and took over the

facilities previously operated by River's Edge, UAW demanded that Adult bargain with UAW; that Adult stipulated that it has continued to manage the facilities and provide care and service in basically unchanged form with the same residents, employing a majority of the Unit employees without a hiatus; that Adult is a successor to River's Edge and thus has an obligation to recognize and bargain with UAW; that the Charging Parties find themselves before the Board now only because the Board has expanded the coverage of the Act through *Management Training, supra,* reversing *Res-Care, supra;* that it would be a travesty to allow Respondents to continue thwarting their employees' desires for representation after and because the Board has extended the protection of the Act; and that the purpose of the Act is to promote industrial peace and stability, not to sever established collective bargaining relationships.

AFSCME, on brief, incorporates the position of Counsel for General Counsel by reference and AFSCME argues, among other things,[18] that MERC's certifications are entitled to comity; that overall the "YES" votes account for over 86 percent of the votes cast; that no election irregularities are alleged and no objections to any of the elections were ever filed; that no subsequent decertification petition or other challenge to the MERC elections and certifications was ever filed; that the due process entitlements under Michigan law and the Michigan Department of Labor administrative rules are every bit as rigorous and well tended

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[18] AFSCME contends that the collective bargaining engaged in between the parties independently establishes AFSCME's status as bargaining representative and creates an estoppel to any challenge of that status by the providers.

as those pertinent to Board elections and there is no competent record evidence to the contrary; that the providers' arguments to avoid comity or majority status are without merit; and that the certifications are in no way diminished or otherwise affected by the fact that the state is no longer, as a matter of law (by Board decision and by amendment to PERA), eligible as a joint employer.

On brief, UAW contends that under clearly established law, the Board has recognized that River's Edge was under an obligation to continue recognizing the UAW as the collective bargaining representative after the Board had asserted jurisdiction over group homes in the state of Michigan; that the Board should extend comity to the March 25, 1994, election because the procedure followed by the MERC was sufficiently similar to Board procedures; that the MERC election is a valid and binding method for choosing a bargaining representative under Section 9(a) of the Act; that having recognized and bargained with the UAW, River's Edge could not withdraw recognition without objective reasons for doing so; and that as a successor to River's Edge, Adult has a duty to bargain with the UAW.

Respondents, on brief, argue, inter alia, that the material change in circumstances following the elections has destroyed the employers' ability to negotiate wage increases, and union recognition will result in a salary reduction for employees without an offsetting increase in wages; that new elections are the best method to determine the true desires of the employees while Board extension of comity over the State elections is clearly a second best remedy; that Board comity should not be applied when the context in which the elections

were held has materially changed; that the material change in the employer complement has so altered the nature and scope of the collective bargaining relationship that the representation elections should be invalidated; that the State of Michigan's departure from the collective bargaining process so materially altered the identity of the employer that recognition of the elections would violate the Act; that failure to inform employees of the material changes surrounding the elections is unfair; that the election results can be invalidated without inquiring into the subjective minds of employees; that *Management Training, supra,* resolves a jurisdictional issue; that the holding of *Management Training* should not be unnecessarily extended; and that the parties are best suited to select the topics over which they can bargain collectively, and the Board should not interfere by extending comity over the State conducted elections.

Analysis

Before treating the merits, a procedural matter must be resolved. As noted above, Respondents have filed a "MOTION TO REOPEN THE RECORD FOR THE PURPOSE OF INTRODUCING THE ATTACHED SUPPLEMENTAL BRIEF IN LIGHT OF NEWLY DISCOVERED EVIDENCE CONCERNING THE LIFTING OF THE STAY IN *AFSCME v MENTAL HEALTH DEP'T.*, 545 N.W.2d 363, 215 MICH. APP. 1 (1996)." Also as noted above, Counsel for General Counsel has filed a motion to strike Respondents' Supplemental Brief arguing that the document Respondents seek to admit at this late date is immaterial and cumulative and would not require a different result since a copy of the decision is in the record as Charging Party's Exhibit 4 and the decision is referenced in Joint

Exhibit 1, Stipulation 11, with Attachment A listing all Respondents involved. Counsel for General Counsel further argues that in the alternative, Respondents' motion should be granted only for the limited purpose of receiving as an exhibit the September 8, 1997, Order to establish that the Michigan Court of Appeals decision in the case in question is now final. In accord with *Professional Eye Care*, 289 NLRB 738 (1988) Respondents' motion will be granted only to the extent that I will take notice that the decision in question is now final. There is nothing in Respondents' motion that requires reopening the record to receive a Supplemental Brief. Accordingly, to this extent the motion of Counsel for General Counsel will be, and it is hereby, granted.

Are MERC's elections and certifications entitled to comity from the Board? In my opinion, with exceptions described below, comity should be extended by the Board to the MERC elections and certifications. As noted above, Respondents, on brief, argue, inter alia that the Board's extension of comity over State elections is clearly a second best remedy. We are not approaching this issue before us in terms of "good, better and best." Majority status may be established by means other than a Board election. *JMM Operational Services*, 316 NLRB 6 (1995) citing *Mine Workers v. Arkansas Flooring Co.*, 351 U.S. 62 (1956). As the Board pointed out in *Standby One Associates*, 274 NLRB 952 (1985):

> Our policy with regard to extending comity to state proceedings is set forth in *Allegheny General Hospital*, 230 NLRB 954, 955 (1977) enf. denied on other grounds 608 F.2d 965 (3d Cir. 1979), where the Board stated:

> Our established practice has been, and continues to be, to accord the same effect to the election and certifications of responsible state government agencies as we attach to our own provided that the state proceedings reflect the true desires of the affected employees, election irregularities are not involved, and there has been no substantial deviation from due process requirements.

No election irregularities are cited and Respondents have not shown that there has been a substantial deviation from due process requirements. What Respondents argue is that there has been a change in circumstances because the State of Michigan would no longer be at the bargaining table. In view of the Board's decision in *Management Training Corp.*, 317 NLRB 1355 (1995) whether or not the State of Michigan is at the bargaining table is not determinative with respect to the Board's jurisdiction. Respondents apparently argue that whether or not the State of Michigan is at the bargaining table may be determinative with respect to whether the involved employees would continue to want to be represented by a union, and it is necessary to hold new elections to make this determination. Except as noted below, no showing has been make that MERC did not have jurisdiction over Respondents at the time of the elections and certifications. As pointed out by the Board in *Doctor's Osteopathic Hospital*, 242 NLRB 447 (1979), such certifications are not void for want of jurisdiction at the time of issuance. That being the case, the certifications, except as noted below, are valid in terms of jurisdiction, as far as the Act is concerned. Respondents are

not arguing that the certifications are invalid because of the present subjective intent of the involved voters. Respondents cannot make such an argument for such intent, even if it were relevant in this proceeding, and it is not, is not a matter of record. Viewed from the employees' perspective, I do not believe that whether or not the State is at the bargaining table, in the circumstances extant here, is likely to affect their views and attitudes with respect to being represented by a union. But my opinion on this point is not determinative. The issue before me is whether to extend comity. No reason has been provided for not extending comity to the extent that it is recommended that it be extended. If employee sentiment has changed, the proper approach would be to file a decertification petition.

As noted above, Counsel for General Counsel quotes, at page 17 of her brief, as follows from *Doctor's Osteopathic Hospital, supra*:

> the court did not, however, question the PLRB's jurisdiction over Respondent as of the time of the election and certification. .... We conclude that the PLRB certification is not void for want of jurisdiction at the time of its issuance.

The language left out of the middle of this quote reads: "Indeed, the parties stipulated to the PLRB's [Pennsylvania Labor Relations Board] jurisdiction at the hearing. Accordingly ...." Counsel for General Counsel on this same page of her brief also contends as follows:

> Although some of the instant facts can be distinguished from those in *Doctor's Osteopathic [Hospital]*, they are distinctions without a difference in the context of Respondents' Quality Living argument. In both cases, at the time the elections were held, the state had jurisdiction over the proceedings, and the Board did not.

In *Doctor's Osteopathic Hospital*, the Board's jurisdiction became effective on August 25, 1974, the involved state election was held on June 13, 1973 and the state certification is dated October 18, 1973. Here the Board decided Management Training on July 28, 1995.[19] All of the elections which were held after July 28, 1995, were ordered by the Michigan State agency; none of these were held with the consent of the involved providers. Those ordered elections which were conducted after July 28, 1995, were held by the Michigan State agency when it did not have jurisdiction. Accordingly, the units involved in those elections which were held by the State after July 28, 1995, will not be included in those to which I recommend that comity be extended. The certifications for the state elections held after July 28, 1995, are void for want of jurisdiction at the time of their issuance.

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[19] It is noted that AFSCME, on brief, points out that a motion for reconsideration in that proceeding was denied on December 18, 1995. Normally under the Board's Rules and Regulations the filing and pendency of a motion for reconsideration] does not operate to stay the effectiveness of the action of the Board unless so ordered. It has not been demonstrated that it was so ordered. Consequently, the operative date is July 28, 1995.

Adult is the successor to River's Edge. As pointed out by the Court in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), an employer which continues essentially the same business as a prior employer and which hires a majority of its employees from those who had been employed by the prior employer is a successor to the prior employer and is required by law to bargain with the union which was selected by the employees of the predecessor. In determining whether an employer is a successor the following factors are considered: (1) whether there has been a substantial continuity of the same business operations, (2) whether the new employer used the same plant, (3) whether the new employer has the same or substantially the same work force, (4) whether the same jobs exist under the same working conditions. (5) whether the employer employs the same supervisors, (6) whether the employer uses the same machinery, equipment and methods of production, and (7) whether the employer manufactures the same product or offers the same services. As noted above, the parties entered into the following stipulation:

> 13. On about March 1, 1995, Respondent ALS [Adult] took over the management of the facility and the care and supervision of the residents at the facility in Newberry, Michigan, previously operated by River's Edge. On about April 4, 1995, Respondent ALS took over the management of three facilities and the care and supervision of the residents of those facilities in or near Sault Ste. Marie, Michigan previously operated by River's Edge. Since winning the contracts and taking over the facilities, Respondent ALS has continued to manage the facilities and provide

> care and service in basically unchanged form with the same residents, employing a majority of the Unit employees and without a hiatus,

Adult is the successor to River's Edge and, therefore, it has an obligation to recognize and bargain with UAW.

The evidence of record demonstrates that all of the Respondents, except Adult, were requested by AFSCME in writing to recognize it as the exclusive collective bargaining representative of the respective units. The evidence of record also demonstrates that Adult was requested by UAW in writing to recognize it as the exclusive collective bargaining representative of the employees in the involved unit. As alleged in the complaint, all of the remaining Respondents, except Adult, unlawfully refused to recognize and bargain with AFSCME, and Adult unlawfully refused to recognize and bargain with UAW.

Conclusions of Law

1. Respondents are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. American Federation of State, County and Municipal Employees, (AFSCME) AFL-CIO, and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America are labor organizations within the meaning of Section 2(5) of the Act.

3. Adult Learning Systems, Inc. is the successor of River's Edge Residential Services, Inc..

4. American Federation of State, County and Municipal Employees, (AFSCME) AFL-CIO, has been, and is, the exclusive representative of all employees in the following appropriate units for the purpose of collective bargaining within the meaning of Section 9(a) and Section 9(b) of the Act:

> All full-time and regular part-time program aides/direct care workers, including emergency relief employees employed in the following homes operated by Michigan Community Services, Inc.: 1) Berneda, 5142 Berneda Drive, Flint, MI 48506; 2) Park Street, 1125 Park Street, Lapeer, MI 48446; 3) River Road, 6290 River Road, Flushing, MI 48443; 4) Westview, 6260 Westview, Grand Blanc, MI 48439; 5) Day Program I, Wolcott-Cornerston, 3131 Vasser Road, Davison, MI 48243; 6) Granada, 7088 Granada Lane, Flint, MI 48532; 7) Neff Road, 7085 Neff Road, Mt. Morris, MI 48458; 8) Weston, 4181 Weston Drive, Burton, MI 48509; 9) Day Program II, St. Agnes-Cornerston, 530 W. Pierson Road, Flint, MI 48505; and 10) Briarwood, 8620 Joey Drive, Pickney, MI 48169; but excluding guards and supervisors as defined in the Act.
>
> All full-time and regularly scheduled part-time direct care workers employed at the following homes operated by Saginaw Bay Human Services, Inc.: 1) Airport Drive AIS, 13768 Airport Road, Lansing, MI 48906; 2) Foco

AIS, 3377 Foco Rd., Standish, MI 48658; 3) Garfield AIS, 2976 N. Garfield, Pinconning, MI 48650; 4) Newberg AIS, 490 W. Newberg, Pinconning, MI 48650; 5) Pine AIS, 2956 Pine River Rd., Standish, MI 48658; 6) River AIS, 2522 Pine River Rd. Standish, MI 48658; 7) Schavey Road AIS, 1009 Schavey Rd., DeWitt, MI 48820; 8) Spring Street AIS, 1401 N. Spring St., Gladwin, MI 48624; 9) Townline AIS, 1748 E. Townline, Pinconning, MI 48650; 10) Webb Road AIS, 303 W. Webb Rd., DeWitt, MI 48820; 11) Kasemeyer, 5181 Kasemeyer , Bay City, MI 48706; 12) Josephus Residential Treatment Center, 1003 Street, Bay City, MI 48708; and 13) Webb Drive, 700 Webb Drive, Bay City, MI 48706; but excluding guards and supervisors as defined in the Act.

All full-time and regular part-time employees employed by AHS Community Services, Inc. in residential and supportive independence programs in Wayne and Oakland Counties; but excluding supervisors, managers, assistant managers, directors, guards as defined in the Act

All full-time and part-time direct care workers/program aides employed by Alternative Services, Inc. in Genesee and Wayne Counties; but excluding managers, administrators, guards and supervisors as defined in the Act.

All full-time and regular part-time direct care workers, including the Per Diem employees at the Litchfield Home, employed by Bay-Arenac Community Living Facility; but excluding administrators, managers, guards and all supervisors as defined in the Act.

All full-time and part-time direct care workers, including emergency relief employees, employed by Independent Opportunities, Inc.; but excluding all temporary/pool aides, all home managers, assistant home managers, administrators, guards, and supervisors as defined in the Act.

All full-time and part-time direct care workers, including emergency relief employees employed in St. Clair County by Innovative Housing Development Corp.; but excluding all temporary/pool aides, administrators, home managers, assistant home managers, guards and supervisors as defined in the Act.

All full-time and regular part-time program aides/direct care staff employed by Jones AFC, Inc.; but excluding administrators, home managers, assistant home managers, guards and supervisors as defined in the Act.

All full-time and regular part-time employees employed by Lafayette RCA, Inc.; but excluding administrators, directors, managers,

assistant managers, guards and supervisors as defined in the Act.

All full-time and regular part-time program aides/direct care workers employed by Lewisite, Inc.; but excluding administrators, home managers, assistant home managers, guards and supervisors as defined in the Act.

All full-time and regular part-time residential technicians/direct careworkers employed by Blue Water Developmental Housing, Inc.; but excluding home managers, assistant home managers, directors, guards and supervisors as defined in the Act.

All full-time and regular part-time program aides/direct care staff employed by Carson's AFC, Inc.; but excluding administrators, home managers, assistant home managers, guards and supervisors as defined in the Act.

All full-time and regular part-time employees in the classes of senior direct care workers and direct care workers employed by Cencare Foster Care Home, Inc.; but excluding administrative employees, confidential employees, guards and supervisors as defined in the Act.

All full-time and regular part-time direct care workers, including emergency relief workers employed in all of the homes of Central State

Community Services, Inc., but excluding temporary/pool aides, administrators, home managers, assistant home managers, guards and supervisors as defined in the Act.

All full-time and regular part-time "direct hire" program assistants, program assistants, program assistant/shift leaders and program assistant/midnight shift leaders employed by Community Normalization Home, Inc.; but excluding appointed officials, executives, guards and supervisors as defined in the Act.

All full-time and regular part-time employees employed by Community Spirit Homes, Incorporated; but excluding managers, assistant managers, directors, administrators, guards and supervisors as defined in the Act.

All full-time and regular part-time non-supervisory employees employed by Domel Incorporated; but excluding managers, assistant managers, directors, guards and supervisors as defined in the Act.

All full-time and regular part-time program aides/direct care workers employed by Flushing Association In Transitional Housing, Inc. Successor to A.R.C. Corporation; but excluding administrators, home managers, assistant home managers, guards and supervisors as defined in the Act.

All full-time and regular part-time direct care staff employed by Fredericks Family Homes A.F.C. Inc. within the County of Wayne, Michigan; but excluding home managers, assistant home managers, administrators, directors, guards and supervisors as defined in the Act.

All full-time and regular part-time program aides/direct care workers employed by Harrington House, Inc.; but excluding administrators, home managers, assistant home managers, guards and supervisors as defined in the Act.

All Full-time and part-time direct care workers employed by Horizon Residential Center, Inc. at its facilities located at 1) Omo Group Home, 56575 Omo, New Haven, MI 48043; (2) Elmwood Group Home, 50084 Sass Road, New Baltimore, MI 48047; (3) Fisher Group Home, 71865 Fisher, Romeo, MI 48065; but excluding guards and supervisors as defined in the Act.

All full-time and regular part-time employees employed by Hunt St. Villa, Inc.; but excluding managers, assistant managers, directors, administrators, guards and supervisors as defined in the Act.

All Full-time and regular part-time employees employed by New Outlook, Inc. in residential and supportive independence programs in the Counties and Wayne and Oakland, MI; but excluding managers, assistant managers, directors, guards and supervisors as defined in the Act.

All full-time and regularly schedules part-time direct care workers employed by Louisiana Homes, Inc. at 1) 9601 St. Mary's, Detroit, MI 48226; 2) 614 Golden Gate, Detroit, MI; and 3) 3055 Hanley, Hamtramck, MI 49212; but excluding administrators, department heads, guards and supervisors as defined in the Act.

All full-time and regular part-time employees employed by New Center II, Inc.; but excluding administrators, directors, managers, assistant managers, guards and supervisors as defined in the Act.

All full-time and regular part-time direct care workers employed by Passages Community Services, Inc.; but excluding administrators, home managers, assistant home managers, guards and supervisors as defined in the Act.

All full-time and regular part-time program aides/direct care workers employed by Quality Living Systems Management Corp., Paragon Non-Profit Housing Corp.; but excluding

administrators, home managers, assistant home managers; guards and supervisors as defined in the Act.

All full-time and regular part-time employees employed by Ray Roberts Residential Services, Inc.; but excluding managers, assistant managers, directors, guards and supervisors as defined in the Act.

All full-time and regular part-time direct care workers, employed in the following homes operated by Reach Alternative Community Homes, Inc. and the State Department of Mental Health at: 1) Oak Hill Group Home 7010 Oak Hill, Clarkston, MI 48348; 2) Bigelow Group Home, 10539 Bigelow, Davisburg, MI 48350; 3) Seven Lakes Group Home, 2332 Grange Hall Road, Fenton, MI 48430; 4) Leidich Group Home, 1087 Leidich, Lake Orion, MI 48362, and (5) Indianwood Home.

5. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America has been, and is, the exclusive representative of all employees in the following appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) and 9(b) of the Act:

All full-time and regularly scheduled part-time direct care workers employed at Adult Learning Systems, Inc.'s residential care

homes in Newberry, Michigan, and in or near Sault Ste. Marie, Michigan; but excluding office clerical employees, directors, managers, board members, guards and supervisors as defined in the Act.

6. By refusing to recognize and bargain collectively with the above-named labor organizations as the exclusive representative of all of its employees in the appropriate unit, the Respondents have engaged in, and they are engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondents have engaged in certain unfair labor practices, I shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I shall order all remaining Respondents, except Adult Learning Systems, Inc., to bargain with American Federation of State, County and Municipal Employees, (AFSCME) AFL-CIO as the exclusive representative of all their employees in the appropriate units which units are described above.

I shall order Adult Learning Systems, Inc., to bargain with International Union, United Automobile, Aerospace and

Agricultural Implement Workers of America as the exclusive representative of all their employees in the appropriate unit which is described above.

I shall also order that the Respondents post notice to employees attached as an appendix for 60 days in order that employees may be apprised of their rights under the Act and Respondents' obligation to remedy their unfair labor practices.

On these findings of fact and conclusion of law and on the entire record, I issue the following two recommended Orders:[20]

ORDER

The Respondents described above in paragraph "4." of the Conclusions of Law, their officers agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith with American Federation of State, County and Municipal Employees, (AFSCME) AFL-CIO as the exclusive bargaining representative of the employees in the bargaining units described above.

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[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102,48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, bargain with American Federation of State, County and Municipal Employees, (AFSCME) AFL-CIO as the exclusive representative of the employees in the above-described appropriate units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days after service by the Region post at their above-described facilities copies of that attached notices marked "Appendix A(1-28)."[21] Copies of the notices, on forms provided by the Regional Director for Region 7, after being signed by Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced or covered by any other material. In the event that during the pendency of these proceedings, any of the Respondents have

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[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

gone out of business or closed the facilities involved in these proceedings, the involved Respondent(s) shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent(s) at any time since April 26, 1996.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

ORDER

Respondent Adult Learning Systems, Inc. its officers agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America as the exclusive bargaining representative of the employees in the bargaining unit described elsewhere in this decision.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America as the exclusive representative of the

employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regularly scheduled part-time direct care worker employed at Adult Learning Systems, Inc.'s residential care homes in Newberry, Michigan, and in or near Sault Ste. Marie, Michigan; but excluding office clerical employees, directors, managers, board members, guards and supervisors as defined in the Act.

(b) Post at their above-described facilities copies of that attached notices marked "Appendix B"[22] Copies of the notices, on forms provided by the Regional Director for Region 7, after being signed by the authorized representative of Adult Learning Systems, Inc., shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the

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[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 8, 1996.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington D.C., January 9, 1998

/s/ _____
John H. West
Administrative Law Judge

Supreme Court, U.S.
FILED
MAR 31 2003
CLERK

(2)

No. 02-1111

In the Supreme Court of the United States

MICHIGAN COMMUNITY SERVICES, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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19 pp

QUESTION PRESENTED

Whether substantial evidence supported the decision of the National Labor Relations Board to afford administrative comity to elections conducted by the Michigan Employee Relations Commission among petitioners' employees on April 20, 1989.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 309 F.3d 348. The decision and order of the National Labor Relations Board (Pet. App. 28a-41a), and the decision of the administrative law judge (Pet. App. 42a-89a) are reported at 332 N.L.R.B. No. 22.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 2002. The petition for a writ of certiorari was filed on January 24, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners operate group homes for individuals with disabilities in Michigan. Pet. App. 2a, 4a, 45a. Those operations are funded by annual contracts with the Michigan Department of Mental Health (MDMH). The contracts establish the level of wages and benefits for which MDMH will reimburse petitioners during the term of the contracts. *Id.* at 4a, 21a-22a. Under Section 2(2) of the National Labor Relations Act (NLRA), 29 U.S.C. 152(2), petitioners are subject to the jurisdiction of the National Labor Relations Board (Board) as "employers." Pet. App. 45a. MDMH, however, is not subject to the Board's jurisdiction, because it is exempt from Section 2(2)'s definition of "employer." See 29 U.S.C. 152(2) ("The term 'employer' * * * shall not include * * * any State or political subdivision thereof."); Pet. App. 4a.

In 1985, the Union[1] began organizing petitioners' employees. Pet. App. 4a. In January 1988, the Union filed representation petitions with the Michigan Employee Relations Commission (MERC). *Id.* at 4a-5a, 33a, 46a. The Union filed the representation petitions with MERC rather than the Board because, under the then-governing Board decision in *Res-Care, Inc.*, 280 N.L.R.B. 670 (1986), the Board would not exercise

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[1] Two labor organizations are involved in this case, the American Federation of State, County & Municipal Employees (AFSCME) and the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). AFSCME conducted all but one of the organizing campaigns at petitioners' facilities. See Pet. App. 5a n.1, 32a-33a. For purposes of this brief, the distinction between AFSCME and the UAW is not relevant. Accordingly, we refer to the two labor organizations collectively as "the Union."

jurisdiction over Section 2(2) employers (such as petitioners) when they have close ties to an exempt governmental entity (such as MDMH). Pet. App. 4a, 10a-13a, 33a & n.4, 46a.

MERC asserted jurisdiction over petitioners and MDMH pursuant to state law. Rejecting MDMH's position to the contrary, MERC found that MDMH is a "joint employer[ ]" of petitioners' employees. Pet. App. 4a-5a, 47a, 48a.[2] On April 20, 1989, MERC conducted elections among the employees at petitioners' facilities. The Union won each election and was certified by MERC as the employees' collective bargaining representative. *Id.* at 5a-6a, 33a, 53a & n.12. MDMH, however, refused to bargain with the Union and sought judicial review of MERC's certifications in state court. *Id.* at 6a, 33a, 53a & n.12. Petitioners, in turn, refused to honor MERC's certifications in light of MDMH's unwillingness to participate in collective bargaining. *Id.* at 6a, 33a. After protracted state-court litigation, MERC's certifications were upheld by the Michigan Court of Appeals. *Id.* at 5a, 6a, 47a; see *AFSCME* v. *Louisiana Homes, Inc.*, 511 N.W.2d 696 (Mich. Ct. App. 1993) (per curiam), cert. denied, 513 U.S. 1077 (1995).

The Board, however, then overruled the *Res-Care* jurisdictional standard that had been in place at the time MERC conducted the elections. See *Management Training Corp.*, 317 N.L.R.B. 1355, 1358 (1995). In its *Management Training* decision, the Board held that it will assert jurisdiction over employers (such as petitioners) with close ties to an exempt governmental

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[2] Two otherwise independent entities may be deemed "joint employers" of the same group of employees if the firms share or codetermine essential employment terms of those employees. See Pet. App. 32a n.3.

entity, provided that the employer at issue meets (i) Section 2(2)'s definition of "employer" and (ii) the Board's established monetary standards for an assertion of jurisdiction in the relevant industry. See Pet. App. 13a-14a.

Following the Board's *Management Training* decision, MDMH requested the Michigan Court of Appeals to reconsider its earlier affirmance of MERC's certifications of the Union. Pet. App. 6a, 49a. Granting that request, the state court of appeals concluded that MERC's jurisdiction over petitioners was preempted by the NLRA. The state court therefore vacated MERC's certifications of the Union. *Id.* at 6a-7a, 33a-34a, 47a-48a; see *AFSCME* v. *Department of Mental Health*, 545 N.W.2d 363 (Mich. Ct. App. 1996).

2. In March and July 1996, the Union requested petitioners to engage in collective bargaining pursuant to the NLRA without MDMH's participation. Petitioners, however, refused to bargain with the Union on that basis. Pet. App. 7a-8a, 34a, 54a. The Union then filed unfair labor practice charges against petitioners with the Board. *Id.* at 8a, 34a. Acting on the Union's charges, the Board's General Counsel issued a consolidated complaint alleging, in relevant part, that petitioners had violated Section 8(a)(5) of the NLRA, 29 U.S.C. 158(a)(5), by refusing to bargain with the Union based on the 1989 MERC elections. Pet. App. 8a, 34a-35a, 42a.[3]

After a hearing, the Board (in agreement with the administrative law judge) sustained that allegation. Pet. App. 34a-35a. Applying settled Board precedent,

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[3] Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees." 29 U.S.C. 158(a)(5).

the Board concluded that it was appropriate to afford administrative comity to the 1989 MERC elections because: (i) the result of the elections reflected the voters' true representational desires, (ii) there had been no showing of election irregularities, and (iii) due-process requirements had been observed. *Id.* at 34a-35a & n.8 (applying *William Okie, Jr. (Standby One Associates)*, 274 N.L.R.B. 952, 953 (1985)); see Pet. App. 71a-72a. The Board rejected petitioners' contention that their refusal to bargain with the Union was justified by the fact that MDMH would no longer be at "the bargaining table." *Id.* at 35a; see *id.* at 72a-73a. Rather, the Board concluded that "the removal of joint employer [MDMH] from the bargaining table is not such an unusual circumstance as to relieve [petitioners] from their bargaining obligation" under Section 8(a)(5). *Id.* at 35a. As a remedy, the Board ordered petitioners to bargain with the Union. *Id.* at 36a-37a, 85a-89a.

3. The court of appeals enforced the Board's order as "supported by substantial evidence on the record." Pet. App. 27a. Examining the evidence in light of the Board's standard for affording comity to the decisions of other tribunals, the court held that "the Board did not err in extending comity to the [1989] MERC-conducted elections." *Id.* at 23a. Like the Board, the court found that (i) "the state-conducted elections reflected the true desires of the affected employees," (ii) there had been "no showing of election irregularities," and (iii) there had been "no apparent deviation from due process requirements." *Id.* at 18a.

The court of appeals rejected petitioners' contention that the 1989 MERC elections should be set aside based on an "alleged misrepresentation that MDMH was a joint employer in these proceedings." Pet. App. 19a. Petitioners argued that, under *Mitchellace, Inc.* v.

NLRB, 90 F.3d 1150 (6th Cir. 1996), the court should apply a multi-factor test for determining whether a misrepresentation during an organizing campaign warrants setting aside a Board-conducted election. The court, however, held *Mitchellace* inapplicable because "there was no misrepresentation concerning MDMH's status as a joint employer." Pet. App. 21a. The court explained that, "[a]t the time that MERC conducted the elections, it was the case that MDMH was considered to be a joint employer"; further, "everyone knew, or should have known, that the status of [MDMH] as employer under [state law] was subject to vigorous litigation." *Id.* at 20a. The court thus found no evidence in the record that petitioners' employees had been "misled by the status of MDMH at the time of the elections." *Ibid.*

The court of appeals also rejected petitioners' contention that "the changed circumstance of MDMH not being at the bargaining table called into question whether the election results reflected the desires of their employees to be represented by the Union[]." Pet. App. 21a. The court observed that petitioners' annual contracts with MDMH "do not prevent the employers from agreeing to increase [wage and benefit] terms during collective bargaining with their employees." *Id.* at 22a. Moreover, the court found that "the only real change in the employees' situation resulting from the Board's recognition of the [1989] MERC-conducted elections * * * is that [petitioners'] employees are now authorized to strike," which "strengthen[s] their ability to enforce their bargaining

demands." *Ibid.*[4] Given those circumstances, the court found that it was "not very likely that" MDMH's absence from "the bargaining table would have affected employee views and attitudes about union representation." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. To the contrary, petitioner's primary argument is that the Sixth Circuit misapplied its own precedents. Accordingly, further review is unwarranted.

1. Petitioners err in contending (Pet. 9-23) that the court of appeals applied an incorrect legal test in determining whether to accept the results of the 1989 MERC elections. The Board's "established practice" is to afford administrative comity to "the elections and certifications of responsible state government agencies" when (i) "the state proceedings reflect the true desires of the affected employees," (ii) "election irregularities are not involved," and (iii) "there has been no substantial deviation from due process requirements." *William Okie, Jr. (Standby One Assocs.)*, 274 N.L.R.B. 952, 953 (1985) (quoting *Allegheny Gen. Hosp.*, 230 N.L.R.B. 954, 955 (1977), enforcement denied on other grounds, 608 F.2d 965 (3d Cir. 1979)). See, *e.g.*, *Doctors Osteopathic Hosp.*, 242 N.L.R.B. 447, 448 (1979), enforced mem., 624 F.2d 1089 (3d Cir. 1980); *St. Luke's Hosp. Ctr.*, 221 N.L.R.B. 1314, 1315, enforced, 551 F.2d

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[4] Before the Board asserted jurisdiction, Michigan law would have barred the employees from calling a strike. See Pet. App. 5a, 22a (noting effect of Michigan's Public Employment Relations Act).

476 (2d Cir. 1976); *Cornell Univ.*, 183 N.L.R.B. 329, 334 (1970).

Applying those settled principles, the court of appeals correctly concluded that substantial evidence supported the Board's decision to afford administrative comity to the 1989 MERC elections. See Pet. App. 18a-19a, 27a. First, the court found that "the state-conducted elections reflected the true desires of the affected employees." *Id.* at 18a. In support of that finding, the court cited evidence that "eighty-five percent of the employees in the thirty subject [bargaining] units voted in favor of union representation." *Ibid.* The court also cited evidence that, "in nine of the units, there were zero votes cast against union representation." *Ibid.* Second, the court found that there had been "no showing of election irregularities." *Ibid.* The court noted that "no objections were filed in these elections" and that, "[a]fterwards, there was no decertification petition or challenge to the MERC elections." *Ibid.* Third, the court found "no apparent deviation from due process requirements." *Ibid.* The court cited "testimony that state-election [*i.e.*, MERC's] procedures are as rigorous as the Board's." *Ibid.* Those findings raise no issue warranting this Court's review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

a. Petitioners nonetheless argue (Pet. 9-11) that the court of appeals erred by applying the holding of *Management Training Corp.*, 317 N.L.R.B. 1355 (1995), to decide whether to accept the results of the 1989 MERC elections. Petitioners' contention, however, is based on a mischaracterization of the court of appeals' decision. The Board's decision in *Management Training* articulated a new two-part test for determining *whether the Board will exercise jurisdiction* over an employer with

close ties to an exempt governmental entity. See *id.* at 1358. Under that test, the Board inquires whether the employer at issue meets (i) the NLRA's definition of "employer" and (ii) the Board's established monetary standards for an assertion of jurisdiction in the relevant industry. *Ibid.*; see Pet. App. 13a-14a. *Management Training* replaced an earlier Board test that examined whether the exempt governmental entity possessed substantial control over essential employment terms of the Section 2(2) employer's workers. See *Res-Care, Inc.*, 280 N.L.R.B. 670, 670 n.1, 673-674 (1986); Pet. App. 13a; pp. 2-3, *supra.*

Contrary to petitioners' suggestion, the court of appeals in this case did *not* apply (much less extend) *Management Training* to determine *whether to accept the results* of the 1989 MERC elections. Rather, in answering that question, the court (like the Board) applied the Board's settled three-part test, articulated in *Standby One Associates*, *supra*, for determining whether an election conducted by a responsible state agency acting with ostensible jurisdiction is entitled to administrative comity. See Pet. App. 18a-19a (applying *Standby One Associates*, *supra*); *id.* at 34a-35a & n.8. And, the court correctly held that, consistent with that test, substantial evidence supported the Board's decision to afford administrative comity to the 1989 MERC elections. See *id.* at 18a-19a, 27a.[5]

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[5] The court of appeals applied *Management Training* to resolve a different question—the effect of another set of elections—not before this Court. See Pet. App. 23a-27a. In addition to the 1989 elections at issue here, MERC conducted a set of elections among the employees of certain group home operators (including two of petitioners) *after* the Board had issued its *Management Training* decision in July 1995. The Union won those elections. See *id.* at 7a, 8a n.3. The Board declined to afford those elections administrative

b. Petitioners also contend (Pet. 13-23) that the court of appeals erred in refusing to apply the multi-factor test set forth in *Mitchellace, Inc.* v. *NLRB*, 90 F.3d 1150 (6th Cir. 1996), when determining whether a "misrepresentation" during an organizing campaign warrants setting aside a Board-conducted election. See Pet. App. 20a (discussing *Mitchellace* factors). "The *Mitchellace* analysis," petitioners urge, "is appropriate in this case because all parties involved with the election were subject to the misrepresentation that the State of Michigan [*i.e.*, MDMH] was a joint employer" of petitioners' employees. Pet. 14.

The proper scope of the Sixth Circuit's *Mitchellace* decision is not an issue that warrants this Court's review, and the court of appeals properly resolved that question in any event. As the court of appeals explained, the *Mitchellace* test was not applicable because there was no "misrepresentation" with respect to MDMH's status as a joint employer at the time of the 1989 MERC elections. See Pet. App. 20a. When MERC conducted the 1989 elections, MDMH in fact "was considered to be a joint employer." *Ibid.* Furthermore, "everyone knew, or should have known, that the status of [MDMH] as employer under [state law] was subject to vigorous litigation" and thus potentially subject to change. *Ibid.* In deciding whether to vote for or against the Union, a reasonable employee therefore would have taken into account the possibility that MDMH ultimately might not be a party to collec-

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comity, and the court upheld the Board's decision on the ground that *Management Training* had *already* deprived MERC of jurisdiction over those employers at the time the elections were held. See *id.* at 23a-26a, 34a & n.7, 35a-36a, 74a. The Union has not sought this Court's review of that ruling.

tive negotiations between petitioners and the Union (assuming the Union was selected as the employee's bargaining representative). Absent evidence demonstrating that the employees who voted in the 1989 MERC elections had been "misled by the status of MDMH at the time of the elections," *ibid.*, the court properly declined to apply its *Mitchellace* test to this case.[6]

2. Petitioners also err in contending (Pet. 24) that "application of Board comity in this matter undermines the doctrine of federal preemption." As a general rule, a State is preempted from exercising jurisdiction over representational matters as to which the Board has asserted its jurisdiction. See *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U.S. 767 (1947). However, Section 14(c)(2) of the NLRA, 29 U.S.C. 164(c)(2), permits "any agency * * * of any State" to "assum[e] and assert[] jurisdiction over labor disputes over which the Board declines * * * to assert jurisdiction." Here, at the time of the 1989 elections, the Board had declined to exercise its jurisdiction over employers (such as petitioners) with close ties to an exempt governmental entity. See Pet. App. 4a, 10a-

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[6] Petitioners contend (Pet. 13) that their inability to know in advance that MDMH would ultimately be absent from the bargaining table deprived them of the opportunity to mount an effective campaign against the Union. That contention is unpersuasive. Petitioners posit (see Pet. 3 n.1, 12, 19) that MDMH controls the amount that petitioners are able to pay employees and that MDMH will not agree to increase the reimbursement levels specified in its annual contracts with petitioners. Nothing prevented petitioners from making the same arguments to the voters before the 1989 MERC elections, or from advising the voters that state law prohibited them from seeking to alter MDMH's position by calling a strike.

13a, 33a & n.4, 46a; see also *Res-Care, Inc.*, 280 N.L.R.B. 670 (1986). MERC was therefore authorized by the NLRA to assert jurisdiction over petitioners at that time. The Board's extension of administrative comity to the election results thus represented a proper application of federal law and was consistent with principles of federal preemption.

3. Finally, petitioners are mistaken in asserting (Pet. 25-28) that MDMH's absence from the bargaining table is a "changed circumstance" that required the court of appeals to reject the results of the 1989 MERC elections. As the court of appeals found, "the only real change in the employees' situation resulting from the Board's recognition of the [1989] MERC elections * * * is that [petitioners'] employees are now authorized to strike." Pet. App. 22a; see pp. 6-7 & note 4, *supra*. While petitioners' employees would have been prohibited from striking against MDMH under state law before the Board overruled *Res-Care, Inc.* and asserted jurisdiction, they now may strike against petitioners under the NLRA. Because that change "strengthen[s]" rather than weakens the employees' "ability to enforce their bargaining demands," the court of appeals correctly found that it was "not very likely that the absence of the MDMH at the bargaining table would have" adversely "affected employee views and attitudes about union representation." Pet. App. 22a. To the contrary, to the extent they had any effect, the NLRB's assertion of jurisdiction, MDMH's absence from the bargaining table, and the employees' resulting ability to strike, would have increased the attractiveness of union representation.

Petitioners nonetheless urge (Pet. 27) that "[e]mployees would hardly have voted for a decrease in their wages to finance a union dues deduction, in light of the

improbability of wage increases at the bargaining table." That argument is incorrect for two reasons. First, it is based on the unwarranted assumption that employees seek collective representation only to bargain over wages. Employers and unions may choose to bargain over a variety of non-wage subjects, such as employee evaluation and disciplinary procedures, grievance procedures, and scheduling of work. See 29 U.S.C. 158(d) (defining collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to * * * confer in good faith with respect to wages, hours, and other terms and conditions of employment").

Second, even with respect to wages, petitioners' annual contracts with MDMH do not prevent petitioners from agreeing to wage increases. See Pet. App. 22a. Through collective bargaining, petitioners and the Union may be able to identify cost savings in areas of petitioners' operations to pay for a wage increase. Further, the employees' ability to call a strike against petitioners under the NLRA is likely to have a bearing on whether MDMH will agree to raise the reimbursement rates in its annual contracts with petitioners in order to fund any wage increases petitioners and the Union may negotiate during collective bargaining.

For similar reasons, petitioners err in suggesting (Pet. 26, 28) that the present case involves changed circumstances similar to those at issue in *NLRB* v. *Parsons School of Design*, 793 F.2d 503 (2d Cir. 1986) (*Parsons*). In that case, the court concluded that a new election was required when, after holding an initial election in a bargaining unit consisting of *both* full- and part-time faculty members, the Board modified the bargaining unit to include *only* part-time faculty. *Id.* at 504. The court found that, in the circumstances of that

case—which included the union's narrow margin of victory—the "realities of the workplace" did not support the Board's determination that part-time faculty would not have voted differently if had they had known in advance that the bargaining unit would not include full-time faculty. *Id.* at 507.

No such conclusion can be drawn here. The Board did not modify the scope of the bargaining units in which MERC conducted the 1989 elections. Furthermore, as discussed above, the "realities of the workplace," *Parsons*, 793 F.2d at 507, support the conclusion that petitioners' employees would not have voted differently even if they had known for certain that the NLRB would assert jurisdiction and that, as a result, MDMH would not be a participant in collective bargaining. Those changed circumstances allow employees to strike in support of their bargaining demands—an ability that makes union representation more rather than less attractive, and enhances the employees' ability to influence not only petitioners' conduct but also MDMH's willingness to reimburse petitioners for any increased wages. Moreover, unlike the election in *Parsons*, the results of the 1989 MERC elections were not close. In the aggregate, 85% of the employees voted in favor of the Union. Pet. App. 18a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
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